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THE IMPACT OF JUDGMENTS IN SPAIN V COMMISSION (KOSOVO) ON KOSOVO EU MEMBERSHIP

Gentjan Skara* and Ferdinand Xhaferaj**

Abstract: On 17 January 2023, the Court of Justice delivered its judgment in the Spain v Commission (Kosovo) case, ruling that despite the EU's non-recognition of Kosovo as a State, Kosovo may participate as a third country in an EU agency under the obligations laid down in Article 35(2) of the BEREK Regulation. The judgment is significant because it clarifies Kosovo's relations with the EU and, more specifically, the ability of Kosovo as a third country to participate in EU agencies. This article analyses the Court of Justice of the European Union judgments in Spain v Commission (Kosovo) and discusses the impact on the future accession of Kosovo to the EU. The paper argues that while these judgments have a positive effect on the consideration of Kosovo as a 'third country' in joining EU bodies and agencies, non-recognition of Kosovo as an independent State by five EU Member States is an obstacle to advancing further its prospects of European integration.

Keywords: General Court, Court of Justice, Kosovo, third country, third State, EU regulatory bodies, EU accession

1 Introduction

When Kosovo declared its independence on 17 February 2008, the EU intensified its relations with it. Firstly, the EU deployed a civilian operation (the EULEX mission) to assist the Kosovo authorities in the rule of law area, and provided the prospect of membership by acknowledging it as a candidate country. Then in 2012, the Commission launched a visa liberalisation dialogue with Kosovo and issued a feasibility study for a Stabilisation and Association Agreement (SAA), which entered into force on 1 April 2016.¹

The SAA with Kosovo is the first contractual agreement between the EU and Kosovo. Moreover, the SAA with Kosovo represents a new phase of political relations between the two parties. As an association agreement,

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¹ Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016] L71/3 (SAA with Kosovo).

the SAA contains various cooperation provisions at different institutional levels between the EU and Kosovo, and pursues an EU integration agenda. One of the areas of cooperation is electronic communications networks and services. The main purpose of cooperation in this area is the adoption by Kosovo of the EU acquis, 'paying particular attention to ensuring and strengthening the independence of the relevant regulatory authorities'.²

In compliance with Article 111 of the SAA with Kosovo and goals set out in the Digital Agenda for the Western Balkans, on 18 March 2019 the Commission adopted a decision regarding the participation of the Office of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (BEREC).³ The decision was based on Article 35(2) of the BEREC Regulation, which requires that

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.⁴

In the Commission's view, the SAA fulfilled the cumulative conditions and an 'agreement to that effect', as required by Article 35(2) of the BEREC Regulation.

Pursuant to the Commission's decision allowing Kosovo to take part in BEREC as a third country, Spain, as one of the hard non-recognisers of Kosovo independence, challenged the validity of the decision before the General Court of the European Union (General Court) and then appealed the decision to the Court of Justice of the European Union (Court of Justice).

By adopting a doctrinal legal research methodology, this article analyses the Court of Justice of the European Union judgments in *Spain v Commission (Kosovo)* and discusses their impact on the future accession of Kosovo to the EU. In addition, the paper contains a reference to other Court of Justice of the European (CJEU) cases, international law, and secondary sources. The paper argues that while these judgments have a positive effect on the consideration of Kosovo as a third country in joining EU bodies and agencies, non-recognition of Kosovo as an independent State by five EU Member States is an obstacle to advancing further its prospects of European integration.

² SAA with Kosovo, Art 111.

³ 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 [2019] OJ C 115.

⁴ 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 [2018] L 321/1 (the BEREC Regulation).

The paper consists of this introduction and four sections. The second section provides a short historical overview of Kosovo's independence and relations with the EU. The third and fourth sections discuss the judgments of the General Court and Court of Justice, focusing more on how the GC and CJEU treated the question of Kosovo's participation in an EU agency as a third country. The fifth section comments on and analyses the impact of the Court of Justice ruling on Kosovo and EU relations, particularly on Kosovo's accession to the EU.

2 Kosovo and EU relations – between engagement and (non-) recognition

On 17 February 2008, Kosovo declared its independence from Serbia. However, its recognition has remained contentious in the international community and among EU Member States.⁵ The official website of the Ministry of Foreign Affairs claims that Kosovo has been recognised by 117 countries.⁶ On the other hand, Serbia's diplomacy has been very aggressive on the issue of Kosovo's non-recognition, even announcing the withdrawal of recognition.⁷ In the EU context, Kosovo is not recognised as an independent State by five EU Member States.⁸ Spain, as a strong opponent of recognising Kosovo among the five States, brought an action before the CJEU for annulment of the Commission's decision allowing Kosovo to take part in BERIC as a third country. The four other EU Member States – Cyprus, Greece, Romania and Slovakia – did not support Spain in the proceedings.⁹ In fact, three of these EU members, (Greece, Slovakia and Romania) have engaged to a certain extent with Kosovo.¹⁰

Despite the issue of its non-recognition as an independent State, the EU has strengthened cooperation with Kosovo. The EU deployed a civilian operation known as the European Union Rule of Law Mission in

⁵ Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009); James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (IB Tauris 2011).

⁶ Ministry of Foreign Affairs and Diaspora, 'List of Recognition' <<https://mfa-ks.net/lista-e-njohjeve/>> accessed 17 November 2023. The data on recognition of Kosovo are controversial, since some countries have announced their withdrawal of it, but it still appears on the official website.

⁷ Eugen Cakolli, 'Kosovo: Between Universal Non-recognition and "Derecognitions"' (KAS 2020); Agata Palickova, '15 Countries, and Counting, Revoke Recognition of Kosovo, Serbia Says' <<https://www.euractiv.com/section/enlargement/news/15-countries-and-counting-revoke-recognition-of-kosovo-serbia-says/>> accessed 17 November 2023.

⁸ Ioannis Armakolas and James Ker-Lindsay (eds), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo* (Palgrave Macmillan 2020).

⁹ Celia Challet and Pierre Bachelier, 'Can Kosovo Be Considered as a "Third country" in the Meaning of EU Law? Case note to *Spain v Commission*' [2021] Maastricht Journal of European and Comparative Law 339, 405.

¹⁰ Ioannis Armakolas, 'Greece: Kosovo's Most Engaged Non-recogniser' in Ioannis Armakolas and James Ker-Lindsay (n 8) 123-146; Milan Nič, 'Slovakia: Diplomatically Engaged with Kosovo, but no Recognition' in Ioannis Armakolas and James Ker-Lindsay (n 8) 147-171; Paul Ivan, 'Romania: Kosovo's Cautious Non-recogniser' in Ioannis Armakolas and James Ker-Lindsay (n 8) 173-192.

Kosovo (EULEX mission) within the framework of the Common Security and Defence Policy.¹¹ Operating under UNSC Resolution 1244,¹² the EULEX mission aims to assist the Kosovo authorities in the rule of law area, specifically in the areas of policing, justice and customs.¹³

Moreover, the EU has intensified its cooperation with Kosovo within the Stabilisation and Association Process.¹⁴ Kosovo signed the SAA on 27 October 2015 and it entered into force on 1 April 2016.¹⁵ The SAA with Kosovo was signed between the European Union and Kosovo. Unlike previous SAAs signed with other Western Balkan countries, where EU Member States were part of the agreement, in this case EU Member States are absent due to a lack of recognition by five Member States.¹⁶ This position is acknowledged in Recital 17 of the SAA with Kosovo and reinforced in Article 2, which states that:

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 the individual Member States of Kosovo in that capacity where they have not taken such a step.

The SAA with Kosovo aims to establish a relationship with the EU based on reciprocity and mutual interest that allows Kosovo to further strengthen and extend its relations with the EU.¹⁷ It covers wide areas that require Kosovo to harmonise its domestic law in line with the EU acquis. According to Article 74(1) of the SAA with Kosovo, Kosovo will endeavour to approximate its domestic legislation and ensure its proper implementation and enforcement. In addition to the conditions to be fulfilled by Kosovo, the SAA contains various cooperation provisions at different institutional levels between the EU and Kosovo, pursuing an EU integration agenda.

¹¹ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L 42/92.

¹² United Nation Security Council Resolution 1244 (S/RES/1244) 10 June 1999.

¹³ Martina Spornbauer, 'EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date' [2010] German Law Journal 769; Robert Muharremi, 'The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law' [2010] ZaöRV 70, 357-379; Gentjan Skara, 'The Bumpy Road of EULEX as an Exporter of Rule of Law in Kosovo' [2017] Academicus - International scientific Journal 69.

¹⁴ Commission, 'Stabilisation and Association Process' <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/stabilisation-and-association-process_en#:~:text=The%20Stabilisation%20and%20Association%20Process,establishing%20a%20free%2Dtrade%20area> accessed 19 November 2023.

¹⁵ SAA with Kosovo (n 1).

¹⁶ Peter Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' [2017] European Foreign Affairs Review 394.

¹⁷ SAA with Kosovo (n 1) Recital 2.

One of the SAA areas of cooperation with Kosovo is electronic communications networks and services. Article 111 of the SAA with Kosovo lays down rules that provide the obligation for Kosovo to strengthen its cooperation with the EU in this area. The final goal is the adoption by Kosovo of the EU *acquis* within five years of the entry into force of the SAA. Particular attention is given to ensuring and strengthening the independence of the relevant regulatory authorities.

After the development of the EU Digital Single Market, on 6 February 2018 the Commission launched the Digital Agenda for the Western Balkans.¹⁸ The initiative intended to allow the Western Balkan countries to benefit from digital tools and to ensure prosperity for their citizens. A communication set out the main areas to be covered by the Digital Agenda for the Western Balkans. In the end, the Commission recommended certain actions to be taken to develop a digital society and for the domestic legislation of Western Balkan countries to be aligned with the EU *acquis*.

On 22 June 2018, the Commission issued a working document entitled *Measures in Support of a Digital Agenda for the Western Balkans*.¹⁹ One of the actions was the incorporation of national regulatory bodies into existing regulatory ones or expert groups such as the Body of European Regulators for Electronic Communications (BEREC). Concerning the incorporation of national regulatory authorities into BEREC, the Commission stated that:

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 BEREC Regulation.²⁰

The revised BEREC Regulation was adopted on 11 December 2018.²¹ The BEREC Regulation established the Body of European Regulators for Electronic Communications, which replaced and succeeded the Body of European Regulators for Electronic Communications established by Regulation (EC) No 1211/2009. As stipulated in Recital 5, the BEREC Regulation aims, *inter alia*, to contribute to the development and better functioning of the internal market for electronic communications networks and services. Article 35 of the BEREC Regulation provides the possibility for BEREC to cooperate with Union bodies, third countries and international organisations. According to Article 35(2) of the BEREC

¹⁸ Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans' [2018] COM(2018) 65 final, 14.

¹⁹ Commission, 'Measures in support of a Digital Agenda for the Western Balkans' [2018] Commission Staff Working Document SWD(2018) 360 final.

²⁰ *ibid* 16.

²¹ BEREC Regulation (n 4).

Regulation, the Board of Regulators, working groups and Management Board are open to the national regulatory authorities of third countries that have an agreement with the EU.

As Kosovo had entered into an agreement with the EU, and in compliance with the goals set out in the Digital Agenda for the Western Balkans, on 18 March 2019 the Commission adopted a decision regarding the participation of Kosovo's national regulatory authority in BEREC.²² Under Article 35(2) of the BEREC Regulation, the Board of Regulators, the working groups and the Management Board are open to the national regulatory authorities of third countries with primary responsibility in the field of electronic communications that 'have entered into agreements with the Union to that effect'. In the Commission's view, the SAA fulfilled the cumulative conditions and represented an 'agreement to that effect', as required by Article 35(2) of the BEREC Regulation. Following the Commission's decision to allow Kosovo to take part in BEREC, Spain, as one of the hard non-recognisers of Kosovo independence, pursuant to Article 263 TFEU,²³ challenged the validity of the decision before the General Court, and then appealed the decision to the Court of Justice.

3 Judgment of the General Court of the European Union (T-370/19) K Spain v Commission

In the judgment *Spain v Commission* of 23 September 2020,²⁴ the General Court decided on three issues. The first issue concerned whether Kosovo could be considered as a 'third country' in the light of the BEREC Regulation. The second issue questioned whether the SAA with Kosovo could be considered an 'agreement' as required by Article 35(2) of the BEREC Regulation. The third issue questioned whether the Commission had infringed Article 35 of the BEREC Regulation insofar as the Commission had departed from the established procedure for the participation of the NRAs of third countries in BEREC. These three questions are examined briefly below, with a particular focus on the first issue.

3.1 Kosovo as a 'third country' in the light of the BEREC Regulation

In the first plea, Spain argued that Kosovo is not legally a 'third country' and therefore, the necessary conditions for the NRA of Kosovo to participate in BEREC had not been met.²⁵ In Spain's view, Article 35(2) of the BEREC Regulation clearly states that only NRAs of 'third countries'

²² Commission Decision of 18 March 2019 (n 3).

²³ Under Article 263 TFEU, the Court of Justice of the European Union reviews the legality of legislative acts of certain institutions, including Commission decisions that produce legal effects vis-à-vis third parties.

²⁴ Judgment of 23 September 2020, Case T-370/19 *Spain v Commission* ECLI:EU:T:2020:440, paras 21-26.

²⁵ *ibid*, paras 21-26.

are entitled to participate in BEREC. By allowing the NRA of Kosovo to join BEREC, the Commission had infringed Article 35 of the BEREC Regulation, since it had treated Kosovo as a 'third country'. Moreover, Spain argued that even though Kosovo had signed an association agreement with the EU, it still cannot be considered a 'third country' within the meaning of the BEREC Regulation, or treated as a candidate country. In supporting this argument, Spain referred to Article 2 of the SAA, which states that:

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.

In answering the first plea in law, the General Court examined the concept of 'third country' within the meaning of Article 35(2) of the BEREC Regulation and assessed whether 'third country' is equivalent to 'third State' as Spain claimed. As a first step, the General Court noted the lack of definition of 'third country' in EU primary and secondary law, including the BEREC Regulation.²⁶ The General Court emphasised that the TFEU uses both 'third countries' and 'third States'.²⁷ Furthermore, the General Court noted that a substantial number of TFEU provisions concerning EU external action use the term 'third countries' due to the fact that international society is made up of 'States' and entities 'other than States'.²⁸

The General Court went on to argue that TFEU provisions relating to 'third countries' are clearly intended to pave the way for the conclusion of international agreements with entities 'other than States'. In light of this, the General Court held that the EU may conclude international agreements not only with States but also with territorial entities which have the capacity to conclude treaties under international law.²⁹ In supporting these findings where the EU has concluded a number of international agreements with entities other than sovereign States, the General Court referred to agreements concluded with the Palestine Liberation Organisation (PLO), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, the Government of the Hong Kong Special Administrative Region of the People's Republic of China, and the Macao Special Administrative Region of the People's Republic of China.³⁰

In the case of Kosovo, the General Court noted that the EU had entered into several international agreements with Kosovo, thus recognising Kosovo's capacity to conclude such agreements. The General Court

²⁶ *ibid*, para 28.

²⁷ *ibid*, para 29.

²⁸ *ibid*, paras 29-31; Part V of the TFEU.

²⁹ *ibid*, para 30.

³⁰ *ibid*, para 31.

acknowledged that two agreements signed by the EU and Kosovo are considered as international agreements, with Kosovo considered 'a third State'.³¹ In the General Court's view, these contractual relationships concluded with Kosovo were legally possible 'only because the concept of "third country" referred to in those provisions of the TFEU could be construed broadly, thereby allowing the European Union to regard Kosovo as such'.³²

In addition, the General Court acknowledged that recognising the capacity to conclude an agreement under Article 217 TFEU does not mean recognition of Kosovo by the European Union as an independent State. The General Court observed that the EU has not recognised Kosovo as a State by making reference to the 17th Recital and Article 2 of the Kosovo SAA, 'which make clear that that agreement does not constitute recognition of Kosovo by the European Union as an independent State or affect the individual positions of the Member States on its status'.³³

In its conclusion on the first plea, the Court ruled that the concept of 'third country' within the meaning of Article 35(2) of the BEREC Regulation cannot be equated with that of 'third State', as the Kingdom of Spain had submitted. The General Court argued that the concept of 'third country' has a broader scope which goes beyond sovereign States alone. In supporting such a difference, the General Court emphasised that Kosovo, as a 'third country', may also have public authorities and is capable of joining the BEREC Regulation contrary to Spain's assertion that 'only a State can have an NRA'.³⁴ Thus, Kosovo is considered a 'third country' within the meaning of Article 35(2) of the BEREC Regulation and the Commission had not infringed that provision.

3.2 Infringement of Article 35 of the BEREC Regulation, as there is no 'agreement' to allow the NRA of Kosovo to participate in BEREC

In the second plea, Spain argued that the Commission had infringed Article 35(2) of the BEREC Regulation, since there was no 'agreement' to allow the NRA Kosovo to participate in BEREC. Spain considered that Article 111 of the SAA with Kosovo envisaged the strengthening of cooperation to enable Kosovo to adopt the EU *acquis* in the telecommunications sector. In Spain's view, Article 111 of the SAA with Kosovo did not provide for the participation of the NRA of Kosovo in BEREC.

³¹ SAA with Kosovo (n 1); Framework Agreement between the European Union and Kosovo (*1) on the general principles for the participation of Kosovo in Union programmes [2017] L 195/3.

³² *Spain v Commission* (n 24) para 32.

³³ *ibid.*, para 33.

³⁴ *ibid.*, para 36.

To answer this plea, the General Court examined the scope of the concept of ‘agreement with the Union to that effect’, as stipulated in Article 35(2) of the BEREC Regulation, and whether Article 111 of SAA with Kosovo falls within that concept. Article 35(2) of the BEREC Regulation requires two conditions to be fulfilled: i) the existence of an ‘agreement’ between the third country and the EU, and ii) the agreement must have been entered into to that effect. Concerning these two issues, the General Court analysed the nature of the SAA and the object and purpose of Article 111, which seeks to harmonise Kosovo’s domestic legislation with the EU *acquis* in the area of electronic communications and services. The General Court concluded that Article 111 of the SAA with Kosovo is an agreement ‘to that effect’, within the meaning of Article 35(2) of the BEREC Regulation.³⁵

3.3 *Infringement of Article 35 of the BEREC Regulation, as the Commission had departed from the established procedure by allowing the NRA of Kosovo to participate in BEREC*

In its third plea, Spain submitted that the Commission had infringed Article 35(2) of the BEREC Regulation insofar as it had unilaterally established ‘working arrangements’ for the participation of the NRA of Kosovo in BEREC.

The General Court examined the procedure for determining working arrangements applying to the participation of NRAs of third countries in BEREC. Relying on Article 16 TEU and established case law, the General Court concluded that the Commission had the power to decide on the participation of the NRA of Kosovo in BEREC.³⁶

4 The Court of Justice’s judgment in Case C-632/20 *Spain v Commission (Kosovo)*

Again, the Kingdom of Spain appealed the case to the Court of Justice for it to: i) set aside the General Court judgment; ii) rule on the action for annulment and annul the decision at issue; iii) order the Commission to pay costs.³⁷ Spain’s grounds of appeal were grouped under two main questions. The first question asked whether Article 35(2) of the BEREC Regulation, read together with Article 111 of the SAA with Kosovo, permits the participation of the NRA of Kosovo in the work of BEREC. The second question addressed whether the Commission enjoyed the institutional competence to adopt a decision allowing the NRA of Kosovo to participate in BEREC.

³⁵ *ibid*, para 55.

³⁶ *ibid*, para 82.

³⁷ Judgment of 17 January 2023, Case C-632/20 P *Spain v Commission* ECLI:EU:C:2023:28, para 29.

Concerning the first question, the main grounds of appeal by Spain were as follows:

- i) an error of law in the interpretation of the concept of ‘third country’;
- ii) an error of law in the interpretation and application of Article 111 of the SAA with Kosovo, in conjunction with Article 35 of the BEREC Regulation, and
- iii) an error of law in the interpretation of these provisions, since the cooperation precluded the NRA of Kosovo from participating in BEREC.

Spain maintained the position that the term ‘third country’, as used in the TFEU and in the BEREC Regulation, does not have a broader or different meaning from that of the term ‘third State’. Furthermore, the Kingdom of Spain criticised the General Court’s position of relying solely on the provisions of the TFEU relating to third countries.

Unlike the General Court, the Court of Justice did not uphold the distinction between ‘third States’ and ‘third countries’. As a preliminary point, the Court of Justice made two observations. Firstly, the terms ‘third country’ and ‘third State’ have been used interchangeably in many provisions of the TEU and TFEU without making any explicit justification for the use of either term.³⁸ Secondly, the CJEU noted that in several different language versions of the EU Treaties, only the term ‘third State’ is used.³⁹ The Court of Justice criticised the General Court’s conclusion that the provisions of the TFEU relating to ‘third countries’ pave the way for the conclusion of international agreements with entities ‘other than States’, ‘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 terms ‘third country’ and ‘third State’.⁴⁰ In the Court of Justice’s view, the 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. In the case that there is any divergence between those various versions of the treaties, then the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms a part.⁴¹

The Court of Justice then analysed whether the term ‘third countries’, as stipulated in Article 35(2) of the BEREC Regulation, could en-

³⁸ *Spain v Commission* (n 37) para 39.

³⁹ *ibid*, para 44.

⁴⁰ *ibid*, para 44.

⁴¹ *ibid*, para 42; Judgments of 26 January 2021, Joined Cases C422/19 and C423/19 *Hessischer Rundfunk* ECLI:EU:C:2021:63, para 65; Judgment of 14 July 2022, Joined Cases C59/18 and C182/18 *Italy and Comune di Milano v Council (Seat of the European Medicines Agency)* ECLI:EU:C:2022:567, para 67.

compass Kosovo. The Court found that for the purpose of ensuring the effectiveness of Union law, a territorial entity not recognised as a sovereign State should be treated as a 'third country' within the meaning of that provision 'while not infringing international law'.⁴² The Court of Justice did not explain what the non-infringement of international law meant or take into consideration international law as in previous cases with contested statehood.⁴³ Instead, the Court of Justice relied on the ICJ Advisory Opinion, where the ICJ held that Kosovo's unilateral declaration of independence 'did not violate international law, UNSCR 1244/1999, or the applicable constitutional framework'.⁴⁴ The Court of Justice argued that this conclusion does not affect the individual positions of the EU Member States that do not recognise the independence of Kosovo. The Court of Justice went on to argue that 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, as the first footnote to the decision indicates.⁴⁵ The same approach has been asserted in the 17th Recital and in Article 2 of the SAA with Kosovo. By this assertion, the EU remains officially neutral on the international legal status of Kosovo. Nevertheless, it remains unclear why the Court of Justice supported its arguments citing the ICJ advisory Opinion, which does not discuss the issue of Kosovo's statehood.

Concerning the issue of integration of third countries, specifically the NRA of Kosovo, into the BEREC scheme, Article 35(2) of the BEREC Regulation stipulates that participation in the BEREC agency requires the existence of two cumulative conditions: i) the existence of an 'agreement' entered into with the European Union and ii) the fact that the agreement was entered into 'to that effect'.⁴⁶ In the same vein as the General Court, the Court of Justice noted the fact that the Union has entered into several international agreements with Kosovo, 'thus recognizing its capacity to conclude such agreements'.⁴⁷ Article 111 of the SAA with Kosovo provides for cooperation between the EU and Kosovo in the area of electronic communications. This is consistent with the objective of cooperation with third-country NRAs pursued by Article 35(2) of the BEREC Regulation.⁴⁸ In the Court of Justice's view, Article 111 of the SAA with Kosovo is suf-

⁴² *Spain v Commission* (n 37) para 50. To this effect, the Court of Justice referred to the established case law in its Judgment of 24 November 1992, Case C286/90 *Poulsen and Diva Navigation* ECLI:EU:C:1992:453, para 9; Judgment of 5 April 2022, Case C161/20 *Commission v Council (International Maritime Organisation)* ECLI:EU:C:2022:260, para 32.

⁴³ Judgment of 29 September 2021, Case T-279/19 *Front Polisario v Council* ECLI:EU:T:2021:639; Judgment of 25 February 2010, Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* ECLI:EU:C:2010:91.

⁴⁴ *Spain v Commission* (n 37) para 51.

⁴⁵ *ibid.*, paras 52 and 66.

⁴⁶ *ibid.*, para 54.

⁴⁷ *ibid.*, para 55.

⁴⁸ *ibid.*, para 70.

ficient for NRAs to participate in BEREC⁴⁹ and Kosovo can adopt the EU *acquis* in that field.⁵⁰ In the light of the abovementioned argument, the Court of Justice concluded that Kosovo was to be treated as a third country, within the meaning of Article 35(2) of Regulation 2018/1971 and the Commission had not infringed that provision.⁵¹

In relation to the second question, the Kingdom of Spain relied on two grounds of appeal as follows:

- i) an error of law in the interpretation of those provisions, insofar as the cooperation referred to does not include participation in BEREC; and
- ii) an error of law insofar as the judgment under appeal concluded that Article 17 TEU constituted a valid legal basis for adopting the decision at issue.

The Court of Justice found that the Commission lacked the institutional competence to unilaterally draw up working arrangements to allow the participation of the NRA of Kosovo in the work of BEREC. The Court of Justice set the judgment under appeal aside and annulled the relevant decision while maintaining its effects until its replacement by a new act.⁵²

5 Effects of the Court of Justice ruling on Kosovo and EU relations

This case provides an interesting contribution to EU external relations, as the Court of Justice ruled on the distinction between ‘country’ and ‘State’. As noted above, there is a difference in understanding and interpreting the notion of ‘third country’ between the General Court and the Court of Justice. The General Court interpreted the notion of ‘third country’ in a broader sense. This is clear from the General Court conclusion noting that the international community is not made up of States alone, and should the TFEU allow international agreements to be concluded only with States, this would lead to a legal vacuum in the EU’s external relations.⁵³ The General Court highlighted that the TFEU provisions relating to third countries are clearly intended to pave the way for the conclusion of international agreements with entities other than States. In this regard, the EU does not exclusively enter into international agreements with States but, within the flexible concept of ‘country’, can do so with other territorial entities having the capacity to conclude trea-

⁴⁹ *ibid*, paras 56-59.

⁵⁰ *ibid*, para 63.

⁵¹ *ibid*, para 64.

⁵² *ibid*, paras 96-140.

⁵³ Kushtrim Istrefi, ‘The Luxembourg Court Rules on the Difference between States and Countries as International Law Actors’ (2020) EJIL: Talk! <<https://www.ejiltalk.org/the-luxembourg-court-rules-on-the-difference-between-states-and-countries-as-international-law-actors/>> accessed 18 November 2023; *Spain v Commission* (n 24) para 30.

ties under international law.⁵⁴

On the other hand, the Court of Justice rejected the broad interpretation of the General Court, since the terms 'third country' and 'third State' are used interchangeably in many EU and TFEU provisions 'without there appearing to be any particular justification for the use of either term'.⁵⁵ The Court of Justice maintained the position that 'third country' and 'third State' are the same for the purpose of EU legislation dealing with external relations. This conclusion is very important for the EU legal system, as it avoided the creation of an artificial separation between 'third country' and 'third State'.⁵⁶ Unlike the ICJ decision, which has no binding force except between the States in dispute,⁵⁷ the CJEU is uniformly interpreted and applicable in all EU Member States.

This case also provides an interesting contribution to future relations between Kosovo and the EU. The Court of Justice confirmed the interchangeability of the terms 'third country' and 'third State' in the Treaty. In the Court of Justice's reasoning, if a country is a State, then Kosovo should be treated as a State. However, to avoid such a paradox,⁵⁸ the Court of Justice reassured the EU Member States that '[the] 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'.⁵⁹ In other words, the Court of Justice notes that Kosovo might be considered as a country within the BEREC Regulation, but this does not mean that it is automatically recognised as a State in the sense of international law.⁶⁰ In coming to this conclusion, the Court of Justice

⁵⁴ *Spain v Commission* (n 24) para 30.

⁵⁵ *Spain v Commission* (n 37) para 39.

⁵⁶ Carlos Santaló Goris, 'C-632/20 P, *Spain v Commission*: What is Kosovo for the EU? A Third Country? A Third State? Aren't Both Concepts the Same?' (2023) European Institute of Public Administration <<https://www.eipa.eu/blog/op-ed-c-632-20-p-spain-v-commission-what-is-kosovo-for-the-eu-a-third-country-a-third-state-arent-both-concepts-the-same/#>> accessed 18 November 2023.

⁵⁷ ICJ, 'Statute of the International Court of Justice', Art 59.

⁵⁸ Giulio Fedele, 'A Country, but not a State? The Apparent Paradox of International Statehood in Case C-632/20 P, *Spain v Commission* (Kosovo)' [2023] European Papers 537, 542; Kushtrim Istrefi, 'Kosovo is a Country, and a Country Means a State, Rules the Court of Justice of the European Union' (2023) EJIL: Talk! <<https://www.ejiltalk.org/kosovo-is-a-country-and-a-country-means-a-state-rules-the-court-of-justice-of-the-european-union/>> accessed 18 November 2023; Avdylkader Mucaj and Shefki Shterbani, 'CJEU Rules that There is no Difference between the Notion of a Third Country and a State in EU Law' [2023] European Public Law 275.

⁵⁹ *Spain v Commission* (n 24) para 52.

⁶⁰ AG Kokott made clear that the contested decision does not recognise Kosovo as a State. In supporting her conclusions, AG Kokott observed that the Decision of the Commission contains two footnotes stating that the designation is 'without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'. These two footnotes correspond in essence with Recital 17 of the SAA and Article 2 of the SAA. *Spain v Commission* (n 37) Opinion of AG Kokott ECLI:EU:C:2022:473, para. 38.

referred to the ICJ advisory opinion on Kosovo⁶¹ and particularly to the SAA provisions, Recital 17 and Article 2 of the Kosovo SAA respectively, which clearly state this position.⁶²

The non-recognition of Kosovo as a 'State' by five EU Member States raises further questions concerning the future accession of Kosovo to the EU. On 15 December 2022, Kosovo's Prime Minister Albin Kurti submitted a bid for Kosovo to join the European Union.⁶³ According to Article 49 of the TEU, any European State which respects certain values that are common to EU Member States and promotes them may apply to become a member of the Union. Article 49 TEU requires three conditions for candidate countries to be fulfilled: i) being a European State; ii) respecting and promoting values in Article 2 TEU; and iii) conditions of eligibility agreed upon by the European Council (known as the Copenhagen Criteria). While the concept of 'European' generally combines geographical, historical and cultural elements which all contribute to a European identity,⁶⁴ Article 49(1) allows only States to apply for membership. The Lisbon Treaty does not define what constitutes a State or whether recognition by other Member States is necessary to join the EU. Scholars argue that the concept of the 'State' is one that is in line with international

⁶¹ ICJ, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion' [2010] ICJ Reports 2010. In this advisory opinion, the ICJ ruled that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law. Kassoti argues that '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'. Kassoti argues that it is unclear why the Court of Justice relied on this case to support its argument and 'did not really invoke relevant international legal practice'. Eva Kassoti, 'Of Third "States", "Countries" and Other Demons – The CJEU's Judgment in Case C-632/20 P *Spain v Commission (Kosovo)*' (2023) EU Law Analysis <<http://eulawanalysis.blogspot.com/2023/02/of-third-states-countries-and-other.html>> accessed 18 November 2023.

⁶² Recital 17 of the SAA with Kosovo reads 'Noting that this Agreement is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'. While Article 2 of the SAA with Kosovo reads as follows: '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'.

⁶³ Reuters, 'Kosovo formally applies to join EU' (15 December 2022) <<https://www.reuters.com/world/europe/kosovo-submits-eu-membership-application-2022-12-15/>> accessed 19 November 2023.

⁶⁴ Commission, 'Enlargement Strategy and Main Challenges 2006 – 2007, including annexed special report on the EU's capacity to integrate new members' (Communication) COM (2006) 649 final, 18; Dimitry Kochenov, 'EU Enlargement Law: History and Recent Development: Treaty – Custom Concubinage?' [2005] European Integration Online Papers <<http://eiop.or.at/eiop/pdf/2005-006.pdf>> accessed 19 November 2023, 10.

law.⁶⁵ According to the Montevideo Convention, a State is usually defined in international law as an entity with 'a permanent population; a defined territory; and a capacity to enter into relations with other States'.⁶⁶

In the case of Kosovo, the statehood condition is not fulfilled because five EU Member States have not recognised Kosovo as an independent State. The Court of Justice recognised Kosovo as a 'third country' but did not acknowledge the recognition of Kosovo as an independent State by the EU and by individual EU Member States.⁶⁷ Without the five EU Member States' recognition, even though the EU has signed an SAA with Kosovo, there is no possibility of becoming a member of the EU because a decision in enlargement policy must be unanimous.⁶⁸ One of the main reasons why the SAA with Kosovo was not signed by the EU Member States as a mixed agreement was the fear of veto by the five EU Member States.⁶⁹

6 Conclusion

This case provides an interesting contribution from the perspective of EU external relations. Firstly, it is the first case pronouncing the differences between a State and a country. Unlike the General Court, which interpreted in a broader sense the notion of a 'third country', the Court of Justice ruled that the terms 'third country' and 'third State' are used interchangeably in many EU and TFEU provisions without any distinction in their use.⁷⁰ Consequently, the Court of Justice held that such a distinction does not exist as a matter of EU primary and secondary law. In the Court of Justice's view, 'third country' and 'third State' are the same for the purpose of EU legislation dealing with external relations.

However, in analysing the case of Kosovo, the Court of Justice was careful not to acknowledge the recognition of Kosovo as an independent State. The Court of Justice ruled that Kosovo is considered a 'third country' within the meaning of Article 35(2) of the BEREK Regulation, though it is not recognised as an independent State. To support this argument, the Court of Justice referred to the ICJ advisory opinion and Recital 17

⁶⁵ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008) 24; Friedrich Erlbacher, 'Article 49' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 311-318; Susanna Fortunato, 'Article 49' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 1359.

⁶⁶ Montevideo Convention on Rights and Duties of States (1933) <<https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>> accessed 18 November 2023.

⁶⁷ Istrefi (n 53).

⁶⁸ According to Article 49(1), an applicant State addresses its application to the Council, which acts unanimously after consulting the Commission and receiving the consent of the European Parliament.

⁶⁹ Van Elsuwege (n 16) 394.

⁷⁰ *Spain v Commission* (n 37) para 39.

and Article 2 of the SAA with Kosovo. In conclusion, while this case has significance for the NRA of Kosovo participating in BEREC, its implication for Kosovo's future accession remains open due to the issue of whether Kosovo constitutes a State as required by Article 49 TEU.



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