Case Note

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Can Kosovo be considered as a 'third country' in the meaning of EU law? Case note to *Spain v. Commission*

Celia Challet* and **Pierre Bachelier***

Abstract

The question of the recognition of the independence of Kosovo has been a dividing factor among Member States for more than a decade. Never before, however, had it led to an action for annulment before European courts. In *Spain v. Commission*, the Kingdom of Spain challenged the validity of a Commission decision providing for the participation of Kosovo's national regulation authority in the Body of European Regulators for Electronic Communications (BEREC). The General Court ruled that the Commission could consider Kosovo as a third country in order to provide for the participation of its national regulation authority in BEREC. The Commission could also rely on the Stabilisation and Association Agreement concluded between the EU and Kosovo in order to enhance such cooperation. This judgment is of particular importance in terms of both EU-Kosovo relations and participation of third countries in EU agencies.

Keywords

Kosovo, third country, third state, BEREC, Stabilisation and Association Agreement

1. Introduction

The question of the recognition of Kosovo's independence has been a dividing factor among Member States for more than a decade. While the majority of EU Member States have recognized Kosovo's unilateral declaration of independence of 17 February 2008, five Member States, among them Spain, still refuse to do so.[1] In spite of this lack of consensus on the status of Kosovo, the EU

1. As of today, Cyprus, Greece, Romania, Slovakia and Spain have not recognized Kosovo as an independent State.

* College of Europe, Brugge, Belgium

Corresponding author:
Celia Challet, College of Europe, Dijver 11, 8000 Brugge, Belgium.
E-mail: celia.challet@coleurope.eu

has developed a policy of 'engagement' towards Kosovo. The creation of the EU Rule of Law Mission in Kosovo and the conclusion of a Stabilisation and Association Agreement with the latter ('the Kosovo SAA')[2] are examples of that. To quote P. Van Elsuwege, the EU has thus developed an approach of 'diversity on recognition but unity in engagement'[3] towards Kosovo.

However, this policy of engagement has not ended the debates on the possible extent of EU-Kosovo relations, particularly when it comes to sectoral cooperation. The *Spain v. Commission*[4] case is a perfect example of that. This judgment must be understood in the context of the European cooperation in the field of electronic communications. In 2009, the EU adopted Regulation 1211/2009 creating the Body of European Regulators for Electronic Communications (BEREC). Its purpose is to ensure a consistent application of the EU regulatory framework for electronic communications.[5] The BEREC performs its tasks in cooperation with the Commission and national regulation authorities (NRAs). Under Regulation 1211/2009, only NRAs from European Economic Area (EEA) states and from states that were candidates for accession could participate in BEREC. The participation of third countries other than EEA or candidate countries was therefore excluded.

The scope of NRAs entitled to participate in BEREC was, however, quickly considered as too narrow, particularly in view of the EU's policy towards Western Balkans. From 2001 onwards, the EU has concluded a series of stabilization and association agreements ('SAAs') with Western Balkan countries and, as stated above, with Kosovo. These SAAs provide for the strengthening of cooperation in the field of electronic communications, with the ultimate objective of the adoption of the EU *acquis*.[6] In its 2018 working document 'Measures in support of a Digital Agenda for the Western Balkans', the Commission explicitly called for an incorporation of Western Balkans into existing regulatory bodies such as BEREC.[7]

A significant change was brought with the adoption of Regulation 2018/971 ('the Regulation')[8] repealing Regulation 1211/2009 on BEREC. Under Article 35(1) of the Regulation, the BEREC may now cooperate with 'competent authorities of third countries'. Article 35(2) further provides that the BEREC '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'.

2. Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, on the one part, and Kosovo, on the other part, [2016] OJ L 71.
3. P. Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo', 22 *European Foreign Affairs Review* (2017), p. 398.
4. Case T-370/19 *Spain v. Commission*, EU:T:2020:440.
5. 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, [2009] OJ L 337.
6. *Inter alia* Article 111 of the Kosovo SAA; Article 106 of the Montenegro SAA.
7. Commission Staff Working Document, Measures in support of a Digital Agenda for the Western Balkans, 22 June 2018, SWD(2018) 360, p. 15–16.
8. 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), [2018] OJ L 321.

2. Facts and procedure

On 18 March 2019, the Commission adopted six decisions concerning the participation in BEREC the Western Balkans' NRAs, based on Article 35(2) of the Regulation. One of these decisions concerned the participation of the Kosovo NRA in BEREC.[9] For the purpose of such participation, the Commission relied on Article 111 of the Kosovo SAA, which provides for cooperation in the field of electronic communications. In other words, the Commission considered this provision as an 'agreement to that effect' in the meaning of Article 35(2) of the Regulation.

Spain challenged the validity of this decision before the General Court. It alleged that the Commission's decision infringed Article 35 of the Regulation in so far as Kosovo was not a 'third country' and that there was no 'agreement' for the participation of its NRA in BEREC. Spain also argued that as a result of the absence of 'agreement' for such participation, the Commission could not adopt a working arrangement in the meaning of Article 35(1) of the Regulation. Beyond ruling on the validity of a Commission decision, the General Court was therefore called to take a stance on major issues.

3. The ruling of the General Court of the EU

In its *Spain v. Commission* judgment of 23 September 2020,[10] the General Court had the opportunity to rule on two main issues: the question of whether Kosovo could be considered a 'third country' in the meaning of the Regulation on the one hand, and the question of whether the Kosovo SAA could be considered an 'agreement' in the meaning of Article 35(2) of the Regulation on the other hand. These two questions will be examined separately in the framework of the present case note.

A. Status of Kosovo for the purpose of its participation in BEREC

The core question of this case revolved around the status of Kosovo and the possibility for the Commission to consider it a 'third country' for the purpose of its participation in BEREC.

Spain argued that Kosovo is not legally a 'third country' and that therefore, the necessary conditions for the application of Article 35 of the Regulation were not met.[11] Article 35(2) of the Regulation clearly states that only NRAs of 'third countries' are entitled to participate in BEREC.[12] According to Spain, such cooperation 'presupposes the participation of an authority linked to an organization in the nature of a State, with the result that only a State can have an NRA'.[13] Moreover, Spain stressed that the conclusion of an SAA with the EU did not make Kosovo a 'third country' in the meaning of the Regulation[14] nor of EU law in general. Article 2 of this SAA clearly states that this agreement does not constitute recognition of Kosovo's independence by the EU. According to Spain, however, the Commission 'implicitly treated Kosovo in the same way as a ''third country'' in the meaning of the Regulation',[15] even if it had no legal basis

9. 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.
10. Case T-370/19 Spain v. Commission.
11. Ibid., para. 21.
12. Ibid., para. 22.
13. Ibid.
14. Ibid., para. 23.
15. Ibid.

to do so. Overall, Spain's view was that the concept of 'third country' is equivalent to that of 'third state'.

This case was an opportunity for the General Court to examine the notion of 'third country' in the meaning of Article 35(2) of the Regulation and to determine if it is equivalent to that of 'third state'.[16] In their reply to Spain's arguments, the judges recalled that the concept of 'third country' is defined neither by the Regulation nor by any EU legislation.[17] In the absence of any definition, the General Court turned to the wording of the TFEU.[18] The latter refers to both 'third countries' and 'third states', although numerous of its provisions relating to external relations use the wording 'third countries'. This is due to a pragmatic approach of the drafters of the EU treaties: as recalled by the General Court, international society is not made of states only and the TFEU provisions 'are clearly intended to pave the way for the conclusion of international agreements with entities "other than States"'.[19] What matters is that these entities have the capacity to conclude treaties under international law.[20] According to the General Court, claiming that the EU can only conclude international agreements with states would create a 'legal vacuum in the EU's external relations'.[21]

The General Court reinforced its reasoning underlining the EU's well-established practice of concluding international agreements with entities other than states.[22] This includes the SAA concluded with Kosovo, which shows the latter's capacity to conclude such agreements.[23] What is more, the conclusion of international agreements with Kosovo was always surrounded by 'precautions'[24] to exclude any recognition of Kosovo as a state.

According to the General Court, however, these precautions did not amount to excluding Kosovo from the concept of 'third country'. The General Court provided what can be seen as the start of a definition of the concept of third country: 'those precautions are specifically intended to distinguish between the status of "State" and Kosovo's capacity to enter into obligations under international law as an international law actor covered by the broader concept of "third country"'.[25] As a result, the concept of 'third country' cannot be equated with that of 'third state'. In addition, as a 'third country' Kosovo may also have national authorities,[26] which are not, therefore, the sole attribute of states. Consequently, the Commission could consider Kosovo as a 'third country' in the meaning of Article 35(2) of the Regulation.

B. The Kosovo SAA as an 'agreement' in the meaning of Article 35(2) of the Regulation

The second question addressed by the General Court was whether the Kosovo SAA and, in particular, its Article 111, could be considered as an 'agreement' in the meaning of Article 35(2) of the Regulation.

16. Ibid., para. 27.
17. Ibid., para. 28.
18. Ibid., para. 29.
19. Ibid., para. 30.
20. Ibid.
21. Ibid.
22. Ibid., para.31.
23. Ibid., para. 32.
24. Ibid., para. 33.
25. Ibid., para. 34.
26. Ibid., para. 36.

According to Spain, Article 111 of the SAA only envisaged a strengthening of cooperation in the field of electronic communications, in order to enable Kosovo to adopt the relevant EU *acquis*.[27] It did not amount to providing for the participation of Kosovo in BEREC. As a result, the participation of the NRA of Kosovo in BEREC would go beyond the objective of cooperation set out by that provision.[28] According to Spain, by providing for the participation of the Kosovo NRA in BEREC, the Commission 'confused ''cooperation'' under Article 35(1) of the Regulation and Article 111 of the Kosovo SAA with ''incorporation'' under Article 35(2)' of the Regulation.[29]

This reasoning was not followed by the General Court. The latter recalled that unlike Article 35(1) of the Regulation, Article 35(2) makes the participation of a third country NRA subject to the fulfilment of a twofold condition: 1) the existence of an 'agreement' between the EU and the third country concerned and 2) an agreement entered into 'to that effect'.[30] The General Court considered the first condition as fulfilled: the wording of the Regulation refers to an international agreement concluded between two legal persons governed by public international law, which is the case of the Kosovo SAA.[31]

As regards the second condition, the General Court ruled that Article 111 of the Kosovo SAA must be regarded as an 'agreement to that effect'. For that purpose, it compared this SAA with those concluded by the EU with other Western Balkan countries. All these SAAs contain similar provisions as regards cooperation in the field of electronic communications.[32] Since they have been considered as agreements entered into 'to that effect' in the meaning of Article 35(2) of the Regulation, the same conclusion must apply to Article 111 of the Kosovo SAA.[33] According to the General Court, such conclusion was further confirmed by the wording of this provision, which calls for a broad interpretation of its scope.[34] Article 111 of the Kosovo SAA aims to 'strengthen cooperation' between the EU and Kosovo in the field of electronic communications, the ultimate objective being the adoption by Kosovo of the EU *acquis* in that field.[35] Such adoption of the *acquis* would be 'greatly facilitated by the participation of the NRA of Kosovo in the work of BEREC'.[36] As a result, the Commission could lawfully consider that Article 111 of the Kosovo SAA was an 'agreement with the [EU] to that effect'.[37] It could also conclude a working arrangement based on this 'agreement'.[38]

4. Assessment

This case provides an interesting contribution to the law of EU external relations for several reasons. Firstly, it is a clear example of the tensions that still surround EU's relations with entities that have not been universally recognized as states, particularly Kosovo. The fact that this action

27. Ibid., para. 40.
28. Ibid.
29. Ibid., para. 41.
30. Ibid., para. 46.
31. Ibid., para. 47.
32. Ibid., para. 49.
33. Ibid.
34. Ibid., para. 51.
35. Ibid.
36. Ibid., para. 52.
37. Ibid., para. 55.
38. Ibid., para. 82.

for annulment was brought by Spain is not surprising. Spain has always been the fiercest opponent to the recognition of Kosovo among the five EU Member States that still have not recognized it, due to reasons of internal policy.[39] Beyond Spain's position on that matter, the question of Kosovo remains a particularly sensitive issue. In its 2010 Opinion on Kosovo's unilateral declaration of independence, the International Court of Justice was careful not to take any official position on the status of Kosovo.[40] The General Court was clearly aware of the issue at stake and took a measured stance in this judgment. It did not weigh on the debate about the Kosovo's status. The judges limited themselves to the interpretation of the EU treaties and legislation. Even in doing so, they were cautious not to give a precise definition of the notions of 'third country' and 'third state'. They restrained themselves to asserting that the concept of 'third country' has a broader scope than the notion of 'third state', and that Kosovo could fit in the category of 'third country'. It is worth noting, however, that this conclusion was reached through a teleological interpretation of the EU treaties: in order to avoid any 'legal vacuum in the EU's external relations', the EU must have the ability to conclude international agreements with entities other than states, which is what is 'intended' by the treaties' provisions.

By providing an interpretation of the EU legislator's intentions, the General Court addressed an uncertainty as regards the wording of the treaties. No consistency from the Treaty of Rome to the Treaty of Lisbon could be found in the provisions referring to entities outside the Union. The perfect illustration of this diversity of terms lies, *inter alia*, in the evolution of Article 217 TFEU. Initially, this provision allowed the Community to conclude an association agreement with a 'third state'.[41] This expression was then replaced by the one of 'states' by the Treaty of Maastricht.[42] The Treaty of Lisbon eventually substituted the concept of states with the one of 'third countries'.[43] The General Court thus confirmed this approach. Ruling that Kosovo is a 'third country' in the meaning of the EU treaties could not be a clearer indication of that.

Secondly, the General Court confirmed a 'de facto acceptance of Kosovo's sovereignty'[44] that has been developed by the EU institutions over the last decade. In spite of the EU's official position, it has developed a surprisingly enhanced cooperation with Kosovo. This was done, in a first stage, through legal creativity. Already in 2005, the Commission implicitly recognized that the status of Kosovo could constitute an issue when strengthening its relationship with the Union. It stressed that it was 'committed to exploring creative ways to ensure that Kosovo can fully benefit from all EU instruments'.[45] The conclusion of the Kosovo SAA was a confirmation of that. In order to bypass the non-recognition of Kosovo by several Member States, the EU concluded a non-mixed agreement.[46] As a result, although in formal terms the EU and the Kosovo SAA still do not recognize Kosovo as a state, in practice the implementation of the SAA tends to prove otherwise. This functional approach to EU-Kosovo relations was further confirmed by the development of

39. R. Ferrero-Turrión, 'Spain: Kosovo's Strongest Opponent in Europe', in I. Armakolas and J. Ker-Lindsay, *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo* (Palgrave Macmillan, 2020), p. 215.
40. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Reports, p. 403.
41. Article 238, Treaty of Rome.
42. Article 238, Treaty of Maastricht.
43. Article 217, TFEU.
44. P. Van Elsuwege, 22 *European Foreign Affairs Review* (2017), p. 402.
45. Commission Communication – A European Future for Kosovo, COM/2005/0156.
46. On this topic, see P. Van Elsuwege, 22 *European Foreign Affairs Review* (2017), p. 393–410.

sectoral cooperation. The fact that the Commission adopted a decision providing for participation of the Kosovo NRA in BEREC is a clear example of that.[47] By confirming that Article 111 of the Kosovo SAA could be considered as agreement entered into to the effect of participation in BEREC,[48] the General Court thus confirmed the EU's policy of engagement towards Kosovo.

To conclude, this judgment will most likely have major implications on both the EU-Kosovo relation in practice (it might encourage the latter to strengthen cooperation in other sectors) and the participation of third countries in EU agencies. Interestingly, the importance of this case was reflected neither in the features of the proceedings nor in the wording of the judgment. Although Spain is not the only Member State that does not recognize Kosovo, it was not supported by any other Member State in the proceedings. The parties did not ask for an oral exchange of arguments,[49] and the case was adjudicated by the ninth chamber of the General Court. The significance of the case was thus not reflected in the composition of the General Court. The judges themselves did not give the impression that they were ruling on a key issue of EU external relations. Despite dealing for the first time with the interpretation of a concept contained in the Treaties, the General Court did not rely on any case-law from the Court of Justice of the European Union or, for interpretative purposes, from the International Court of Justice. This judgment is thus an example of an issue-based case having broader implications for EU external relations as a whole and for the functioning of EU sectoral bodies. It is worth noting, however, that Spain has appealed the judgment.[50] The future of EU-Kosovo cooperation in the framework of the BEREC is, thus, still on the table. Should the Court dismiss the appeal, one might also wonder how the Spanish NRA will cooperate with Kosovo in BEREC without implicitly recognizing it as a State.

ORCID iD


Celia Challet https://orcid.org/0000-0002-0509-3838

47. Commission Decision [2019] OJ C 115.
48. Case T-370/19 Spain v. Commission, para. 55.
49. Ibid., para. 17.
50. In that regard, see case C-632/20 P, *Spain v. Commission*.