Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 June 2022 [1]

Case C-632/20 P

Kingdom of Spain
v

European Commission

(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 national regulatory authority (NRA) of Kosovo in that body – Concepts of 'third country' and 'third State' – Institutional competence of the Commission)

I. Introduction

1. The BEREC Regulation [2] is the legal basis for the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC ('the BEREC Office').

2. Article 35 of the regulation governs, in particular, cooperation between those bodies and national regulatory authorities (NRAs) of third countries. Pursuant to that provision, the Commission decided, by the contested decision of 18 March 2019, [3] that the NRA of Kosovo was permitted to participate in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office.

3. Spain challenges that decision and, specifically, takes the view that the participation of the NRA of Kosovo is precluded because some Member States, including Spain, have not recognised Kosovo as a sovereign State and, in addition, the European Union has not adopted a position on the matter. Furthermore, Spain questions the Commission's competence to make a unilateral decision on such participation.

[1] Original language: German.

[2] 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).

[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 (OJ 2019 C 115, p. 26).

4. While the parties disagree strongly as to the rules of primary law governing these questions, on closer analysis the present dispute can be settled on the basis of the BEREC Regulation and the Stabilisation and Association Agreement with Kosovo. [4]

II. Legal framework

A. Stabilisation and Association Agreement with Kosovo

5. Between 2001 and 2016 the European Union concluded Stabilisation and Association Agreements (SAAs) with North Macedonia, [5] Albania, [6] Montenegro, [7] Serbia, [8] Bosnia and Herzegovina [9] and Kosovo. The Kosovo SAA is of particular relevance in the present case.

6. The use of the designation 'Kosovo' in the title of the agreement and at the beginning of the preamble is accompanied by the following footnote, which is also reproduced substantively in the recital 17in the preamble:

'This 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.'

7. Article 2 of the Kosovo SAA also concerns the question of recognition of Kosovo as an independent State:

'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.'

8. Article 111 of the Kosovo SAA concerns electronic communications networks and services:

'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.'

4 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).

5 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).

6 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (OJ 2009 L 107, p. 166).

7 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (OJ 2010 L 108, p. 3).

8 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part (OJ 2013 L 278, p. 16).

9 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (OJ 2015 L 164, p. 2).

9. Similar provisions are laid down in Article 95 of the North Macedonia SAA, Article 104 of the Albania SAA, Article 106 of the Montenegro SAA, Article 106 of the Serbia SAA and Article 104 of the Bosnia and Herzegovina SAA.

B. BEREC Regulation

10. The BEREC Regulation repealed Regulation (EC) No 1211/2009,[10] by which BEREC and the BEREC Office had originally been established.

11. According to recital 5 of the BEREC Regulation, BEREC acts as a forum for cooperation among NRAs and between NRAs and the Commission in the exercise of the full range of their responsibilities under the EU regulatory framework. It further states that BEREC was established to provide expertise and to act independently and transparently.

12. Recital 13 of the BEREC Regulation describes the function of BEREC:

'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.'

13. Recital 20 of the BEREC Regulation concerns cooperation with bodies of third countries:

'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 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.'

14. Recital 34 of the BEREC Regulation likewise addresses cooperation with third countries:

'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 EEA EFTA States and candidate countries.'

[10] Regulation 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).

15. Under Article 3(1) of the BEREC Regulation, BEREC is to act within the scope of the Roaming Regulation,[11] the Open Internet Access Regulation[12] and the Directive establishing the European Electronic Communications Code.[13] Within that field, Article 3(2) provides that, in particular, BEREC is to aim to ensure the consistent implementation of the regulatory framework for electronic communications within the scope referred to in Article 3(1).

16. Article 3(3) and (4) of the BEREC Regulation establishes the basic principles for the work of BEREC:

'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].'

17. Article 4 of the BEREC Regulation provides that BEREC is to assist other institutions in regulation of electronic communications. In particular, it is to produce certain opinions, recommendations, common positions and best practices, of which the NRAs and the Commission must take the utmost account.

18. Under Article 7 of the BEREC Regulation, BEREC's Board of Regulators is to be composed of one member from each Member State. Each member is to be appointed by the NRA of the Member State concerned. Members of the Board of Regulators and their alternates are to be appointed in light of their knowledge in the field of electronic communications, taking into account relevant managerial, administrative and budgetary skills.

19. Article 8 of the BEREC Regulation provides that the Board of Regulators and its members are to act independently and in the interests of the European Union.

20. The central provision on cooperation with third countries is Article 35 of the BEREC Regulation:

'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.

[11] Regulation (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).

[12] Regulation (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).

[13] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 (OJ 2018 L 321, p. 36).

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. …'

C. Contested Commission decision of 18 March 2019

21. On 18 March 2019, the Commission adopted the contested decision together with five similar decisions concerning the participation in BEREC of the NRAs of Montenegro,[14] North Macedonia,[15] Bosnia and Herzegovina,[16] Serbia[17] and Albania.[18]

22. The contested decision makes reference in the first two recitals to Article 17(1) TEU and Article 35(2) of the BEREC Regulation respectively.

23. The footnotes to the title of the contested decision and to point 1.1 of its annex reproduce, with regard to the designation 'Kosovo', the corresponding footnotes to the Kosovo SAA:[19]

'This 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.'

24. Recital 3 of the contested decision reads as follows:

'Pursuant to Article 111 … [of the Kosovo SAA], cooperation on electronic communications is to primarily focus on priority areas related to the EU *acquis* in this field. The Parties are to strengthen in particular, cooperation in the area of electronic communications networks and electronic communications services, paying particular attention to ensuring and strengthening the independence of the relevant regulatory authorities. The Union and Kosovo have therefore entered into an agreement within the meaning of Article 35(2) of [the BEREC Regulation] …'

25. According to recital 5 of the contested decision, 'it is appropriate to establish the working arrangements for the participation of the regulatory authority of Kosovo in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office'.

26. Article 1 of the contested decision thus provides that the NRA of Kosovo may participate in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office.

[14] Decision on the participation of the National Regulatory Authority of Montenegro in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 6).

[15] Decision on the participation of the National Regulatory Authority of the Republic of North Macedonia in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 11).

[16] Decision on the participation of the National Regulatory Authority of Bosnia and Herzegovina in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 16).

[17] Decision on the participation of the National Regulatory Authority of the Republic of Serbia in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 21)

[18] Decision on the participation of the National Regulatory Authority of the Republic of Albania in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 31).

[19] See above, point 6.

27. The substantive provisions governing that participation can be found in the annex to the contested decision, which also includes rules on the use of staff from Kosovo and the financial contribution of Kosovo.

III. Procedure to date and forms of order sought by the parties in the appeal

28. By application lodged at the Registry of the General Court on 19 June 2019, the Kingdom of Spain requested the annulment of the contested decision.

29. The Kingdom of Spain based its action on three pleas in law. The first plea in law alleged an infringement of Article 35 of the BEREC Regulation in so far as Kosovo is not a 'third country'. The second plea in law alleged a further infringement of that article in so far as there is no 'agreement with the European Union' for the participation of the NRA of Kosovo in BEREC. By the third plea in law, which also alleged an infringement of that article, Spain complains that the Commission departed from the established procedure for the participation of the NRAs of third countries in BEREC.

30. By the judgment under appeal, the Court dismissed the action and ordered the Kingdom of Spain to pay the costs.

31. On 24 November 2020, the Kingdom of Spain lodged the present appeal and claims that the Court of Justice should:

– allow the appeal and set aside the judgment of the General Court of 23 September 2020 in Case T-370/19 brought against the European Commission;

– annul 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;

– order the other party to the proceedings to pay the costs.

32. The European Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

33. The parties submitted written observations. The Court did not consider it necessary to hold a hearing.

IV. Legal assessment

34. The dispute arises because the European Union has thus far expressly refrained from adopting a position on whether Kosovo has the status of a sovereign State within the meaning of international law. That is made clear in particular by Article 2 and recital 17 of the Kosovo SAA. This clarification is given because some Member States, including Spain, have not recognised Kosovo as a sovereign State.

35. Spain objects to the fact that, by the contested decision, the Commission permitted the participation of the NRA of Kosovo in BEREC pursuant to Article 35 of the BEREC Regulation. After the Court dismissed the action, Spain lodged the present appeal, which it based on five grounds, boiling down to two central questions.

36. First, by the first three grounds of appeal and the first part of the fourth ground of appeal, Spain essentially disputes that Article 111 of the Kosovo SAA and Article 35(2) of the BEREC Regulation constitute a sufficient basis for permitting the NRA of Kosovo to participate in the Board of Regulators, the working groups and the Management Board of BEREC.

37. Second, by the fifth ground of appeal in particular, but also by the second part of the fourth ground of appeal, Spain challenges the institutional competence of the Commission to adopt the contested decision.

38. It must be made clear at the outset, however, that, contrary to the repeated assertions made by Spain, the contested decision does not recognise Kosovo as a State. Rather, the decision contains two footnotes stating that the designation 'Kosovo' 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. Those footnotes correspond in essence to recital 17 of the Kosovo SAA and a similar footnote to that agreement and make clear that the contested decision, like the SAA, is not intended to give rise to any (implicit) recognition of Kosovo as a State.

39. In the absence of the recognition of Kosovo, there is therefore no need in these proceedings to decide on the extent to which institutions of the European Union may declare such recognition. Consequently, the assertion likewise repeatedly made by Spain that the Commission does not have the power to decide on such recognition is ineffective.

A. First to third grounds of appeal and first part of the fourth ground of appeal – participation of the NRA of Kosovo in BEREC

40. Article 35 of the BEREC Regulation governs cooperation with EU bodies, third countries and international organisations. In particular, under the first subparagraph of Article 35(2), the Board of Regulators, the working groups and the Management Board are 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 EU to that effect.

41. According to recital 3 of the contested decision, Article 111 of the Kosovo SAA is such an agreement. Thus, by that decision the Commission permitted the participation of the NRA of Kosovo in BEREC.

42. By the first three grounds of appeal and the first part of the fourth ground of appeal, Spain challenges the findings in which the Court confirmed that such participation by the NRA of Kosovo is permitted.

43. Specifically, Spain objects to the interpretation of the concept of 'third countries' (first ground of appeal) and disputes, in general, that Article 35 of the BEREC Regulation and Article 111 of the Kosovo SAA allow the participation of Kosovo in BEREC (second ground of appeal) and, in particular, that Article 111 of the Kosovo SAA constitutes an agreement within the meaning of

Article 35(2) of the BEREC Regulation (third ground of appeal and first part of the fourth ground of appeal). In addressing the first ground of appeal in particular, it is nevertheless necessary to examine arguments which are relevant to the other grounds of appeal.

1. The first ground of appeal – the concept of 'third countries'

44. In the contested decision the Commission considered Kosovo to be a 'third country' within the meaning of Article 35 of the BEREC Regulation. The Court agreed with this view and found in paragraph 36 of the judgment under appeal that the concept of 'third countries' within the meaning of Article 35(2) has a broader scope than the concept of 'third States', going beyond sovereign States for the purposes of international law and including Kosovo.

45. In support of that finding, the Court held in paragraphs 29 to 35 of the judgment under appeal that the provisions of the TFEU refer to both 'third countries' and 'third States' and thus distinguish between the two concepts. The Court referred in that regard to the headings of Titles III and IV of Part Five of the TFEU and to Articles 212 and 217. It thus found in paragraph 30 of the judgment under appeal 'that the provisions of the TFEU relating to "third countries" are clearly intended to pave the way for the conclusion of international agreements with entities "other than States"'.

46. By its first ground of appeal, Spain asserts that that finding is vitiated by an error in law. In Spain's view, only States for the purposes of international law can come under the concept of 'third countries'. It considers that a broad understanding of the concept of 'third countries' would confer on that concept a different scope in EU law from that in international law.

47. The Commission, on the other hand, considers that on the basis of the various provisions in the Treaties and EU legislation which distinguish between third countries and third States a substantive differentiation must also be made between the two concepts.

48. I take the view that in paragraph 36 of the judgment under appeal the Court did, in essence, correctly interpret the concept of 'third countries' within the meaning of Article 35(2) of the BEREC Regulation. That is readily apparent from an interpretation of the concept of 'third countries' in Article 35 of the BEREC Regulation using conventional methods of interpretation and is consistent with international law practice (see (b) to (f)).

49. I do not consider it appropriate, however, to uphold the reasoning set out by the General Court in paragraphs 29 to 35 of the judgment under appeal to the effect that the distinction between the concepts of 'third State' and 'third country' follows from the wording of the Treaties (see (a)). The Court of Justice should substitute that reasoning with considerations based on the BEREC Regulation.

(a) Usage of the concepts in the Treaties

50. As regards the Court's findings on usage of the concepts in the Treaties, it thereby fails to understand that a distinction is not made between third States and third countries or between States and countries in all language versions of the Treaties. In Estonian, Latvian, Polish and Slovenian in particular, the *same* concept is generally or always used, namely the equivalent of 'third State'. Nevertheless, it is apparent from Articles 198, 208 and 212 TFEU that even those

language versions, apart from Slovenian, do have equivalents to the concept of 'country', for example in connection with the term 'developing country' or in the form of 'non-European countries and territories'.

51. Furthermore, even the language versions which generally make a distinction are not always aligned. For example, the German version of Articles 67, 77, 78 and 79 TFEU refers to '*Drittstaatsangehörigen*' ['nationals of third States'], while the French version, for instance, uses '*ressortisants des pays tiers*', the English version 'third-country nationals' or 'nationals of third countries' and the Danish version '*tredjelandsstatsborgere*', referring to nationals of third countries.

52. This lack of coherence was less pronounced in the original EEC Treaty of 1957, which was authentic in only four languages, but it was evident even then. For example, the German version of Article 3(b) mentions the activities of the Community in customs and commercial policy '*gegenüber dritten Ländern*' ['towards third countries'], while the other three language versions use the concept of 'third States' there.

53. Since, however, the different language versions must be given a uniform interpretation [20] and no language version can be made to override the other language versions, [21] a difference in meaning cannot necessarily be inferred from the distinction between the concepts of 'State' and 'country' in the other language versions of the Treaties.

54. The starting point for the Court's reasoning, namely the clear distinction between the concepts of 'third countries' and 'third States' in the TFEU, which is asserted in paragraphs 29 and 30 of the judgment under appeal, is therefore vitiated by an error in law.

55. However, if the grounds of a judgment of the Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the annulment of that judgment. Rather, a substitution of grounds must be made. [22]

56. It would certainly be conceivable to confirm the Court's interpretation of the provisions of the TFEU by examining the general scheme of those provisions and their purpose. [23] However, it is not sufficient in that regard that, in paragraph 30 of the judgment under appeal, the Court suggested that the provisions of the TFEU relating to 'third countries' are clearly intended to pave the way for the conclusion of international agreements with entities 'other than States'. Rather, there would have to be a much more in-depth examination of the scheme and purpose of all the rules of the Treaties that use the concepts of 'third countries' or 'third State', or perhaps even the concepts of 'country' and 'State', in certain language versions.

[20] Judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraphs 13 and 14); of 27 March 1990, *Cricket St Thomas* (C-372/88, EU:C:1990:140, paragraph 19); and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 43).

[21] Judgments of 27 March 1990, *Cricket St Thomas* (C-372/88, EU:C:1990:140, paragraph 18), and of 26 January 2021, *Hessischer Rundfunk* (C-422/19 and C-423/19, EU:C:2021:63, paragraph 65).

[22] Judgments of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187); of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, paragraph 94); and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 48).

[23] Judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraphs 13 and 14), and of 26 January 2021, *Hessischer Rundfunk* (C-422/19 and C-423/19, EU:C:2021:63, paragraph 65).

57. That is not necessary in the present case, however, as for the purposes of the assessment of the contested decision the concept of 'third country' needs to be interpreted only as it is used by Article 35 of the BEREC Regulation. An interpretation of that provision based on the usual methods confirms the conclusion reached by Court.

(b) Wording of Article 35 of the BEREC Regulation

58. As the Court also held in paragraph 28 of the judgment under appeal, the concept of 'third countries' within the meaning of Article 35 of the BEREC Regulation is not defined in that regulation or in the relevant provisions of the Treaties.

59. In most language versions of Article 35 of the BEREC Regulation, however, the concept of 'third countries' is used, and not the concept of 'third States'.[24] The Commission infers from this that the scope of the concept of third country is different from the scope of the concept of third State.

60. Spain contends that there is no semantic difference between 'third State' and 'third country'. The only relevant difference between the two concepts is the degree of legal formality. Accordingly, general linguistic usage refers to a country's language, a country's climate or the gastronomy of a 'country', but in a legal context the recognition of a 'State'.

61. Along similar lines, the Court has also previously held that the term 'country' is often used in the Treaties as synonym for the term of 'State'.[25]

62. However, the concepts of 'State' and 'country' do not necessarily have to be understood in the same way in every case. Rather, usage of the concept of 'third country' allows a distinction to be made, where appropriate, from the concept of 'third State'.

63. Making such a distinction, in terms of wording, as regards Article 35 of the BEREC Regulation nevertheless raises the same problem, which also exists for the abovementioned provisions of the TFEU. The absence of a distinction between third countries and third States in the Estonian, Latvian, Polish and Slovenian versions of most provisions of primary legislation[26] continues with Article 35 of the BEREC Regulation. Furthermore, two different concepts are used in some cases in the Bulgarian and Lithuanian versions of primary legislation, while in Article 35 of the BEREC Regulation the equivalent of the concept of 'third States' is also used in those language versions.

64. As has already been explained, the wording used in certain language versions 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.[27] Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence

[24] That is true for Spanish, Czech, Danish, German, English, French, Irish, Greek, Croatian, Italian, Hungarian, Maltese, Dutch, Portuguese, Romanian, Slovak, Finnish and Swedish.

[25] Judgment of 12 November 2019, *Organisation juive européenne and Vignoble Psagot* (C-363/18, EU:C:2019:954, paragraph 28).

[26] See above, points 50 and 51.

[27] See above, point 53.

between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. [28] In addition, the origins of the rule can also be a factor in its interpretation. [29]

(c) Regulatory context of Article 35 of the BEREC Regulation

65. Article 35 of the BEREC Regulation must therefore be examined by reference to its regulatory context.

66. Under Article 35(2) of the BEREC Regulation, participation in BEREC requires agreements between the third countries concerned and the European Union to that effect. Recital 34 mentions EEA EFTA States and candidate countries as *examples* of such third countries.

67. In adopting that provision, in any event the legislature thus had in view the arrangements to that effect in relation to cooperation in electronic communications networks and services in the Association Agreements with Albania, Montenegro and Serbia, which the European Union had already recognised as candidate countries for accession at that time.

68. Although Kosovo is not a candidate country, the reference to candidate country status in recital 34, as has been stated, merely serves as an *example* and thus does not limit the range of possible cooperation partners.

69. It is much more important, however, that even before the BEREC Regulation was adopted, the European Union established an arrangement in Article 111 of the Kosovo SAA which, as the Court held in paragraph 49 of the judgment under appeal, is similar in substance to the corresponding arrangements with the candidate countries of Albania, Montenegro and Serbia. Those provisions were sufficient for the NRAs of those countries to participate. It would be illogical, therefore, if Article 35(2) of the BEREC Regulation did not also relate to the arrangement with Kosovo.

70. By the third ground of appeal, Spain complains that the Court did not consider Article 95 of the North Macedonia SAA. Unlike Article 111 of the Kosovo SAA, the sixth indent of the second paragraph of Article 95 of the North Macedonia SAA expressly mentions 'cooperation within European structures' as an area on which cooperation should focus. Spain also refers in that connection to a further document containing detailed information on cooperation, the EU-Tunisia Action Plan implementing the privileged partnership (2013-2017) under the European Neighbourhood Policy. [30] In addition, in the first part of the fourth ground of appeal,

[28] Judgments of 1 March 2016, *Kreis Warendorf and Osso* (C-443/14 and C-444/14, EU:C:2016:127, paragraph 27), and of 24 February 2022, *Tiketa* (C-536/20, EU:C:2022:112, paragraph 27).

[29] Judgments of 22 October 2009, *Zurita García and Choque Cabrera* (C-261/08 and C-348/08, EU:C:2009:648, paragraph 57); of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 135); of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 50); and of 20 December 2017, *Acacia and D'Amato* (C-397/16 and C-435/16, EU:C:2017:992, paragraph 31).

[30] Points 73 and 74 of Annex 2 to the Joint Proposal for a Council Decision on the Union position within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, with regard to the adoption of a recommendation on the implementation of the EU-Tunisia Action Plan implementing the privileged partnership (2013-2017) (JOIN/2014/036 final, Council document 15164/14 ADD 1).

Spain relies on the agreement, which is much more specific than Article 111 of the Kosovo SAA, resulting from a decision of the EEA Joint Committee on the participation of the EEA States. [31]

71. Article 35(2) of the BEREC Regulation was not adopted, however, specifically in the light of these detailed statements on cooperation, but also against the background of the Association Agreements mentioned by the Court. It cannot therefore be inferred from the texts invoked by Spain that such express agreement on cooperation within European Union structures is a mandatory requirement for the application of Article 35(2) of the BEREC Regulation.

72. The regulatory context of Article 35(2) of the BEREC Regulation and the SAAs concluded with the Western Balkan countries thus suggests that the concept of 'third country' in Article 35(2) of the BEREC Regulation includes Kosovo.

(d) Origins of Article 35(2) of the BEREC Regulation

73. The drafting history of the wording of Article 35(2) of the BEREC Regulation confirms the interpretation based on the regulatory context.

74. The wording of Article 26(2) of the Commission Proposal [32] had been ambiguous, providing for 'the participation of regulatory authorities of third countries competent in the field of electronic communications that have entered into agreements with the Union to that effect'. It was not clear whether agreements with the regulatory authorities or agreements with the third countries were necessary.

75. In the course of the deliberations Article 35(2) of the BEREC Regulation was, however, clarified such that there was a requirement that 'those third countries have entered into agreements with the Union to that effect'.

76. That clarification shows, in precisely the same way as recital 34 of the BEREC Regulation, that the European Union adopted Article 35 against the background of the agreements actually existing and thus also in the light of the agreement with Kosovo in Article 111 of the Kosovo SAA.

(e) Teleological interpretation of Article 35 of the BEREC Regulation

77. Lastly, it is also in keeping with the spirit and purpose of Article 35 of the BEREC Regulation to enable cooperation with the NRA of Kosovo.

78. That provision is evidently intended to encourage cooperation between BEREC and the BEREC Office and other regulatory authorities for electronic communications. Accordingly, recital 20 states that BEREC's working arrangements could be aimed at cooperative relationships and exchanges of views on regulatory issues. Spain does not dispute that a regulatory authority for this sector exists in Kosovo.

[31] Decision of the EEA Joint Committee No 274/2021 of 24 September 2021 amending Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement (https://www.efta.int/eea-lex/32018R1971).

[32] Proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (BEREC) (COM(2016) 591 final).

79. Furthermore, according to recital 34 of the BEREC Regulation, such cooperation is intended, in particular, to further extend the consistent implementation of the regulatory framework for electronic communications. With the same objective, Article 111 of the Kosovo SAA states that Kosovo is to adopt the EU *acquis* in the sector.

80. Consequently, the aims of Article 35, as expressly set out in recitals 20 and 34 of the BEREC Regulation, suggest that Kosovo is to be regarded as a third country within the meaning of that provision.

(f) Additional considerations with regard to international law

81. Spain raises the further objection that the interpretation of the concept of 'third country' by the Commission and the Court creates a separate category of entities governed by international law, which is not provided for in general international law.

82. The Commission is correct in contending, however, that there is no generally applicable definition of the concept of 'third country' or 'country' in international law.

83. For example, the 1969 Vienna Convention on the Law of Treaties, in the EU languages of English, French and Spanish at least, uses only the concept of 'States', but not the concept of 'countries'. However, the Geneva Convention of 28 July 1951 relating to the status of refugees, for instance, uses, on the one hand, the concept of '*Vertragsstaaten*' (in other language versions: Contracting States, *États Contractants*) but, on the other, the concept of '*Land*' (country, *pays*), in particular in the form of 'countries of origin' and 'countries of refuge'.

84. First and foremost, however, the International Monetary Fund (IMF) shows that a broader concept of country is also employed in international law. Under Article II of the 'Articles of Agreement of the International Monetary Fund',[33] which is authentic only in English, membership is open to certain 'countries'. On that basis, the IMF has admitted various territorial entities which are not recognised as States, including, in particular, Kosovo,[34] but also Hong Kong, Macao and the British Overseas Territories of Anguilla and Montserrat.[35]

85. The international law practice of the European Union – with regard to Kosovo in particular – shows, moreover, that it is willing to conclude legally binding agreements with territorial entities that it has not recognised as States. Aside from the Kosovo SAA, the European Union has also concluded a Framework Agreement on the general principles for the participation of Kosovo in Union programmes.[36] In addition, the Union has concluded agreements 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, as the Court stated in paragraph 31 of the judgment under appeal.

86. Consequently, the submission regarding possible inconsistencies with international law is also unconvincing. The first ground of appeal must therefore be rejected.

[33] https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf.

[34] IMF Press Release No 09/240 of 29 June 2009, 'Kosovo Becomes the International Monetary Fund's 186th Member'.

[35] See the overview of member countries at https://www.imf.org/en/Countries.

[36] OJ 2017 L 195, p. 1.

2. The second ground of appeal – recognition of Kosovo?

87. By the second ground of appeal, Spain challenges paragraphs 33 and 34 of the judgment under appeal. In that passage the Court recalls that the European Union has not adopted a position on the status of Kosovo as a State in the light of international law, as evidenced by the provisions set out in recital 17 and Article 2 of the Kosovo SAA. According to the Court, those precautions are 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'.

88. Spain links various objections to the contested decision with this ground of appeal. In essence, it alleges that the Commission encroached upon the Member States' competence to decide on the recognition of Kosovo as a State. Although not all Member States had recognised Kosovo as a State, the Commission recognised it, implicitly at least, by the contested decision and thus went further than the Kosovo SAA. That, in Spain's view, constitutes an infringement of Article 111 of the Kosovo SAA in conjunction with Article 35 of the BEREC Regulation, in respect of which the Court did not impose penalties.

89. However, there is no need to ascertain how the competences for the recognition of States are divided between the European Union and the Member States since, as I have already explained, there is no question of any recognition of Kosovo in this case. [37]

90. Above all, however, Article 111 of the Kosovo SAA and Article 35(2) of the BEREC Regulation cannot be infringed because, as has also been highlighted, [38] the aim of those provisions is to integrate the NRA of Kosovo in BEREC.

91. Consequently, the second ground of appeal is unfounded, there being no need to decide whether it is new in relation to the action brought at first instance and therefore inadmissible.

3. The third ground of appeal – participation of the NRA of Kosovo in BEREC and the Management Board of the BEREC Office

92. By the third ground of appeal, Spain complains that the Commission erred in law in interpreting Article 35 of the BEREC Regulation in conjunction with Article 111 of the Kosovo SAA by inferring that the cooperation mentioned therein includes participation in BEREC. In Spain's view, Article 111 of the Kosovo SAA does not constitute a sufficient legal basis for the contested decision because it does not expressly provide for the participation of the NRA of Kosovo in BEREC and the BEREC Office.

93. The question at the heart of the third ground of appeal is thus whether the Kosovo SAA, in particular Article 111, constitutes an 'agreement to that effect' within the meaning of Article 35(2) of the BEREC Regulation, as the Court found in paragraph 49 of the judgment under appeal.

[37] See above, points 38 and 39.

[38] See above, points 65 to 80.

94. Spain objects in that regard that the Court did not take into consideration the North Macedonia SAA which, unlike the other relevant Association Agreements, expressly refers to 'cooperation within European structures'. I have already explained in the discussion of the first ground of appeal, however, that such wording is not a requirement for an agreement within the meaning of Article 35(2) of the BEREC Regulation. [39]

95. Spain further considers that the lack of recognition of Kosovo as a State prevents the participation of the NRA of Kosovo in BEREC being regarded as cooperation under Article 35 of the BEREC Regulation. It is clear from the above considerations, however, that the aim of Article 111 of the Kosovo SAA and Article 35 of the BEREC Regulation is, irrespective of any such recognition, to integrate the NRA of Kosovo in BEREC. [40]

96. Spain nevertheless argues that the concept of cooperation used in Article 111 of the Kosovo SAA does not require participation in BEREC under Article 35(2) of the BEREC Regulation. Cooperation under Article 35(1) of the BEREC Regulation, as has been arranged with other partners, would be sufficient. The participation of Kosovo in the structures of BEREC, on the other hand, gives it influence in shaping EU law, as those structures contribute to its development.

97. It is true that under the contested decision the representatives of the NRA of Kosovo may participate in the Board of Regulators, working groups and the Management Board and, in particular, may express opinions.

98. In their opinions in the Board of Regulators or the Management Board, however, those persons are not to represent the position of Kosovo or its NRA but, under points 1.7 and 3.6 of the Annex to the contested decision, are not to seek or take instructions. The other members of the two boards must also be just as independent under Article 8(2) and Article 15(3) of the BEREC Regulation. BEREC was established, as is stated in recitals 5 and 13 and Article 3(3) and (4), to provide expertise and to act independently and transparently.

99. The cooperation within the boards of BEREC established by the contested decision does not therefore have the characteristics of participation by a State in EU rule-making but is aimed at consistent regulatory practice, whereby only 'utmost account' is to be taken of texts of BEREC pursuant to Article 4(4) of the BEREC Regulation. What is involved is therefore non-binding coordination between regulatory authorities.

100. Nevertheless, even in such context, participation gives the representatives of the NRA of Kosovo no decisive influence on BEREC's decision-making, as, under the second subparagraph of Article 35(2) of the BEREC Regulation, the NRAs of third countries participate without the right to vote.

101. Furthermore, in the light of the reference made in Article 35(2) of the BEREC Regulation to an agreement to that effect, such as that established by Article 111 of the Kosovo SAA, there can be no objection to the fact that the Commission implemented cooperation with the NRA of Kosovo through participation pursuant to Article 35(2) of the BEREC Regulation and not through less intensive cooperation under Article 35(1).

102. Consequently, that submission is also unfounded and the third ground of appeal must be rejected in its entirety.

[39] See above, points 70 and 71.

[40] See above, points 65 to 80.

4. The first part of the fourth ground of appeal – legal basis for the contested decision

103. By the first part of the fourth ground of appeal, Spain once again questions whether Article 111 of the Kosovo SAA constitutes a sufficient basis for the contested decision.

104. In that regard Spain objects in particular to paragraph 72 of the judgment under appeal, which states that 'there is no legal requirement for the "opening-up to the participation" of an NRA of a third country to be dependent on specific authorisation established in an international agreement. That opening-up and the "admission rules" adopted in order to participate in BEREC do not entail any legal obligation vis-à-vis that NRA, since it is ultimately for the NRA, acting freely, to take the subsequent decision to participate in BEREC in accordance with those rules'.

105. Spain contends that Article 35(2) of the BEREC Regulation requires a much more specific agreement, as was concluded by the EEA Joint Committee for example.

106. I have already explained, however, that that decision does not alter the fact that Article 35(2) of the BEREC Regulation was adopted with a view to the much less specific agreements with candidate countries in the Western Balkans, to which Article 111 of the Kosovo SAA corresponds. [41]

107. In contrast, the EEA Joint Committee adopted its decision in implementation of Article 35(2) of the BEREC Regulation, which was already in force at that time. Such decision was not yet possible in the case of the conclusion of the Kosovo SAA for reasons of time. It is therefore logical for the decision of the EEA Joint Committee to be more detailed than Article 111 of the Kosovo SAA.

108. The first part of the fourth ground of appeal is thus also unfounded.

B. Second part of the fourth ground of appeal and fifth ground of appeal – institutional competence of the Commission

109. The second part of the fourth ground of appeal and the fifth ground of appeal object to the fact that it was the Commission that adopted the contested decision. They thus concern its institutional competence.

110. By the second part of the fourth ground of appeal, Spain asserts that the sensitive issue of the recognition of Kosovo requires the Council, and not just the Commission on the basis of Article 17 TEU, to decide on the participation of its NRA in BEREC. That was misunderstood by the Court in paragraphs 81 and 82 of the judgment under appeal.

111. By its fifth ground of appeal, Spain further asserts that in paragraphs 76 and 77 of the judgment under appeal the Court misinterpreted Article 35(2) of the BEREC Regulation in so far as it found that the Commission may by virtue of its executive functions and powers of external representation unilaterally draw up working arrangements.

112. In order to adjudicate on these grounds of appeal, it is necessary to clarify the distribution of competences under Article 35 of the BEREC Regulation.

[41] See above, point 70.

1. The relevant provisions of the agreements

113. The second subparagraph of Article 35(2) of the BEREC Regulation provides that under the relevant provisions of the agreements between the European Union and the third countries concerned mentioned in subparagraph 1 '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'.

114. It might therefore be assumed at first sight that the procedures for the exercise of that competence follow from the respective agreement between the European Union and the third country concerned, as the working arrangement is to be developed under the relevant provisions of that agreement.

115. Article 111 of the Kosovo SAA makes no provision in that regard. Consideration would therefore have to be given to the Stabilisation and Association Council provided for in Article 126, to which Spain, before the Court, requested the matter be referred. However, under Article 128 that Council may take decisions only in the cases provided for in that agreement. Powers are not envisaged for that Council in connection with Article 111. Consequently, no relevant provisions for the development of working arrangements pursuant to the second subparagraph of Article 35(2) of the BEREC Regulation can be inferred from the Kosovo SAA.

116. It cannot be concluded, however, that the development of such arrangements is precluded. Rather, as the Court was correct in stating in paragraph 69 of the judgment under appeal, which is not challenged by Spain, without such arrangements the aims of Article 111 of the Kosovo SAA and Article 35(2) of the BEREC Regulation could not be realised. The Court correctly inferred from that in paragraph 70 of the judgment under appeal, which is also not challenged by Spain, that the reference to the relevant provisions of the agreements merely means that the development of working arrangements may not infringe those provisions.

117. The procedures for the exercise of that power in respect of the participation of the NRA of Kosovo can therefore be found solely in the BEREC Regulation.

2. The development of working arrangements

118. The rule on the participation of the NRAs of third countries in Article 35(2) of the BEREC Regulation provides for working arrangements in subparagraph 2 but does not stipulate either a unilateral decision (see b) or its adoption by the Commission (see a). Both aspects form the basis for errors in law resulting in the setting aside of the judgment under appeal.

(a) Institutional competence of the Commission

119. In essence, Spain successfully challenges the institutional competence of the Commission to adopt the contested decision, which was found in paragraphs 76 and 77 of the judgment under appeal in particular.

120. The first sentence of Article 13(2) TEU provides that each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which

requires that each of the institutions exercise its powers with due regard for the powers of the other institutions. [42]

121. In paragraphs 76 and 77 of the judgment under appeal, the Court finds that the power to adopt the contested decision, as required by that provision, is derived from the Commission's executive functions under the fourth sentence of Article 17(1) TEU and its powers of external representation under the fifth sentence of Article 17(1) TEU. Powers in such areas which have not been expressly delegated to BEREC remain within the competence of the Commission.

122. Such derivation of competences directly from Article 17 TEU is questionable in itself. Executive measures are normally adopted by delegated acts. To that end, Article 290(1) and Article 291(2) TFEU require an express delegation of power to the Commission. [43] Furthermore, in the field of external representation, in principle, authorisation by the Council is necessary under Article 218(2) TFEU.

123. The General Court does rely, in paragraph 81 of the judgment under appeal, on the rule that Article 16 TEU may form the basis for powers of the Council [44] and applies that case-law to Article 17 TEU. There is, however, no need for the Court of Justice to decide whether such delegation is possible because, contrary to the finding made by the General Court in paragraph 77 of the judgment under appeal, the BEREC Regulation governs which bodies may establish working arrangements pursuant to Article 35(2).

124. It is true that, considered in isolation, the second subparagraph of Article 35(2) of the BEREC Regulation includes no such stipulation.

125. However, according to recital 20 of the BEREC Regulation, BEREC should be entitled to establish working arrangements, in particular with competent authorities of third countries. Accordingly, Article 9(i) and Article 20(6)(m) provide that the Board of Regulators and the Director of the BEREC Office are to authorise the conclusion of working arrangements.

126. The Commission, on the other hand, is intended to exercise only a supervisory function in this context under recital 20 of the BEREC Regulation.

127. Specifically with regard to cooperation with third countries, Article 35(1) of the BEREC Regulation provides that BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements.

128. Such distribution of powers between BEREC and the Commission is consistent with the scheme of the BEREC Regulation. BEREC and the BEREC Office are not bodies that are intended to perform the tasks of the Commission and thus enjoy powers derived from the Commission, as the General Court assumes in paragraph 76 of the judgment under appeal. Instead, as is stated in recitals 5 and 13 and Article 3(3) and Article 8(1) of the BEREC Regulation, BEREC is to provide

[42] Judgment of 28 July 2016, *Council* v *Commission* (C-660/13, EU:C:2016:616, paragraph 32).

[43] See, for example, Articles 78 and 79 of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1); and Articles 131 to 133 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94, as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1); and, within the scope of the BEREC Regulation, Articles 117 and 118 of Directive 2018/1972 establishing the European Electronic Communications Code.

[44] Judgment of 28 July 2016, *Council* v *Commission* (C-660/13, EU:C:2016:616, paragraph 40).

expertise and to act independently. That is confirmed by the requirements relating to the independence of its members under recitals 22, 25 and 29 and Article 8(2), Article 16(1)(m), Article 20(3) and Article 42. The members of the Board of Regulators appointed by the NRAs under Article 7 do not therefore act as representatives of their respective NRAs, but participate in discussions within BEREC as experts. In order to guarantee that independence, moreover, recital 32 states that the BEREC Office should have its own budget.

129. It would hardly be compatible with the independence of BEREC if the Commission were accorded unilateral regulatory powers in relation to its work. In addition, the Commission's supervisory function mentioned in recital 20 of the BEREC Regulation is limited to certain matters and cannot lead to specific stipulations without the consent of BEREC or the BEREC Office.

130. The conclusion drawn by the Court in paragraph 78 of the judgment under appeal from the different wordings used in Article 35(1) and Article 35(2) of the BEREC Regulation is therefore also unconvincing. The fact that only Article 35(1) 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 the powers are to be distributed differently under Article 35(2).

131. Rather, Article 35(1) of the BEREC Regulation is the general rule for cooperation with third countries. Article 35(2) regulates the special case of cooperation in the form of the participation by the NRA of a third country in the Board of Regulators, the working groups and the Management Board. The general rule in paragraph 1 nevertheless also applies to that special case if the special rule in paragraph 2 does not provide for any derogation.

132. There is no such special rule as regards the power to develop working arrangements under Article 35(2) of the BEREC Regulation. Consequently, the general rule laid down in paragraph 1, under which BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements, also applies in the context of paragraph 2.

133. Participation in the work of BEREC under Article 35(2) of the BEREC Regulation must, in principle, be considered a closer form of cooperation than cooperation under Article 35(1). However, that aspect also does not require a decision by the Commission, as the legislature has already taken the political decision on such closer cooperation. It allowed that possibility in general by adopting Article 35(2) and must confirm it in respect of the third country concerned by the agreement required under that provision. It did so in the present case by Article 111 of the Kosovo SAA. Although other rules governing the decision on the participation of the NRA in BEREC could have been laid down therein, that did not occur.

134. Consequently, the General Court's conclusion in paragraph 77 of the judgment under appeal that the power to draw up working arrangements applying to the participation of the NRA of Kosovo lies with the Commission is vitiated by an error in law.

(b) Form of the decision on participation

135. Furthermore, the form of the decision on participation is also questionable.

136. The second subparagraph of Article 35(2) of the BEREC Regulation, in the German version, permits working arrangements to be *concluded* [*schließen*], such that there is no unilateral decision by EU institutions or other bodies.

137. It is true that other language versions of that provision refer less clearly to agreements [*Vereinbarungen*]. The English version refers to 'working arrangements' which are to be developed. The concept of 'arrangements' can be construed to mean understandings, but also encompasses rules, and would thus be open to a unilateral stipulation. The French version uses the similar concept of '*arrangements de travail*', which are provided for ('*il est prévu*'). According to the Spanish version, '*normas de trabajo*', or working standards, are even to be established ('*se irán estableciendo*'). The term '*normas de trabajo*' appears to be a translation error, however, as elsewhere in the BEREC Regulation where the other language versions refer to working arrangements, the Spanish version uses the expression '*acuerdos de trabajo*', and thus also assumes an arrangement.

138. Other references to working arrangements in the BEREC Regulation in other languages clearly also show that such texts are not unilaterally determined but agreed between the parties. This can be seen in particular in Article 9(i) and Article 20(6)(m) of the BEREC Regulation, under which the functions of the Board of Regulators and the Director of the BEREC Office include authorising the conclusion of working arrangements inter alia with competent authorities of third countries.

139. It seems to me, however, that what is crucial is the aim of Article 35 of the BEREC Regulation, which is to enable cooperation with the NRAs of third countries. The conditions for cooperation cannot be stipulated unilaterally by the European Union.

140. The Court has therefore infringed Article 35(2) of the BEREC Regulation by finding in paragraph 82 of the judgment under appeal that the Commission had the power to establish *unilaterally*, in the contested decision, working arrangements applying to the participation of NRAs of third countries.

141. It would be conceivable to regard the contested decision as an offer made to the NRA of Kosovo to conclude a working arrangement. However, the Commission has already established the working arrangement by the contested decision according to recital 5 thereof. The judgment under appeal cannot therefore be upheld on that point, even based on other grounds.

3. Interim conclusion

142. The above considerations demonstrate how the second part of the fourth ground of appeal and the fifth ground of appeal are to be decided.

143. Since it has now been established that it is BEREC and the BEREC Office, and not the Council, that decide on the participation of the NRA of Kosovo, subject to approval by the Commission, the second part of the fourth ground of appeal must be rejected.

144. On the other hand, the fifth ground of appeal must be upheld because the Commission did not have the power to adopt the contested decision.

145. The judgment under appeal must therefore be set aside.

V. The action before the General Court

146. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court.

147. The state of the proceedings does permit final judgment to be given as it has been established that the Commission did not have the power to adopt the contested decision.

148. Consequently, the form of order sought by Spain should be granted and the contested decision should be annulled.

VI. Maintenance of the effects of the contested decision

149. If the Court annuls the contested decision, as I propose, solely on the basis of the fifth plea in law, it should maintain the effects of the decision pursuant to the second paragraph of Article 264 TFEU until it is replaced by a corresponding working arrangement.

150. I do not rule out the possibility that the NRA of Kosovo might be able to participate quite extensively in the work of the Board of Regulators, the working groups and the Management Board directly on the basis of the first subparagraph of Article 35(2) of the BEREC Regulation and Article 111 of the Kosovo SAA.

151. However, the arrangements governing financial contributions and staff of the BEREC Office mentioned in the second subparagraph of Article 35(2) of the BEREC Regulation, at least, do not follow directly from the regulation. Its annulment could therefore jeopardise the participation of the NRA of Kosovo, even though, for the reasons explained, legal provision has already been made for such participation independently of an implementing measure.

152. It should also be noted that the decisions on the participation of the NRAs of the other third countries in the Western Balkans are vitiated by the same defects as the contested decision. They are not the subject of the present case, however, and the Court is not therefore required to make any findings in respect of them. It would nevertheless be advisable also to replace those decisions by working arrangements between BEREC, the BEREC Office and the individual NRAs.

VII. Costs

153. 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.

154. Under Article 138(1) of the Rules of Procedure, which applies *mutatis mutandis* to appeal proceedings pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

155. Consequently, the Commission must pay the costs incurred by Spain and bear its own costs.

VIII. Conclusion

156. I therefore propose that the Court should:

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

(2) annul 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) order that the effects of the annulled decision be maintained until it is replaced by a working arrangement pursuant to Article 35(2) of Regulation (EU) 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office);

(4) order the European Commission to pay the costs incurred by the Kingdom of Spain in the proceedings before the General Court and the Court of Justice and to bear its own costs.