

Op-Ed: "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?"

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Introduction

In 2008, the National Assembly of Kosovo voted in favour of declaring its independence from Serbia. Kosovo's unilateral declaration of independence caused a schism on the international scene. While 104 States have acknowledged Kosovo as an independent State, others still consider it a part of Serbia. Nor do all EU Member States acknowledge Kosovo as an independent State; five (Cyprus, Greece, Romania, Slovakia, and Spain) have expressly refused to do so. These Member States' reluctance to recognise Kosovo as an independent State was evident at the recent Committee of Ministers of the Council of Europe's vote to decide whether can Kosovo join the institution. Cyprus, Romania and Spain voted against while Greece and Slovakia abstained.

The existence of divergent approaches towards the independence of Kosovo among Member States has not prevented the European Union from developing strong ties with Kosovo over the years. In 2008, a few months after Kosovo proclaimed its independence, the EU launched its EULEX Mission (Council Joint Action 2008/124/CFSP) to strengthen the rule of law and the democratic functioning of Kosovo. It also appointed a special representative for Kosovo

EU-Kosovo relations reached a turning point with the signing of a Stabilization and Association Agreement in 2016 ('Stabilization Agreement'). Among its objectives, the Stabilization Agreement aims at progressively incorporating the EU *acquis* into Kosovo's legal order. In order to safeguard the position of those Member States which had not recognised Kosovo, Article 2 of the Stabilization Agreement clarifies 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'.

Case C-632/20 P, *Spain v Commission* provided the Court of Justice of the European Union with the opportunity to explore the status of Kosovo under EU law.

Factual and procedural background of the case

The Body of European Regulators for Electronic Communications, better known as BEREC, is an EU body that reunites the national regulators of the Member States in the field, as its name suggests, of electronic communications. It aims to achieve the correct implementation of the EU regulatory framework for electronic communications by the Member States (Art. 3(2) BEREC Regulation). The BEREC is supported by the Agency for Support of BEREC ('BEREC Office'). While the BEREC was mainly conceived for EU Member States, it is open to cooperation with third countries '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' (Article 35(1) of the BEREC Regulation). On that basis, in 2019, the Commission, unilaterally, adopted a Decision inviting Kosovo's National Regulatory Agency ('NRA') to the BEREC and the Management Board of the BEREC Office.

The Commission's Decision faced opposition from Spain, which submitted an action for annulment against it before the General Court of the European Union (T-370/19, *Commission v Spain*). This comes as no surprise considering that the Spain does not recognise Kosovo as an independent State. Spain argued, among other things, that Kosovo did not fit within the notion of 'third country' mentioned by the BEREC Regulation. Spain highlighted that 'the fact that Kosovo concluded an SAA with the European Union does not make it a 'third country'' (para. 23). In this regard, the General Court noted that 'that the concept of 'third country' is not defined in any way in Regulation 2018/1971 or in the relevant EU legislation in the present case' (para. 28). It also made a distinction between the different notions of 'third State' and 'third country'. For the General Court, the notion of third country had a broader sense, covering countries 'which have the capacity to conclude treaties under international law but which are not necessarily 'States' for the purposes of international law' (para. 30). Therefore, since Kosovo fitted in the 'third country' notion, this was not an impediment for its participation in the project.

The General Court rejected all the arguments brought by Spain and dismissed the action.

Spain's appeal against the General Court Justice's judgment

Spain decided to appeal the General Court's judgment, bringing the question of whether or not Kosovo qualifies as a 'third country' before the Court of Justice ('CJ'). Among the grounds invoked by Spain was 'an error of law in the interpretation of the concept of 'third country' within the meaning of Article 35 of Regulation 2018/1971'. The CJ would reject the General Court's approach towards the notion of 'third country'. In this regard, the CJ opposed considering a 'third country' as something different from a 'third State'. To support this, the CJ argued that in the Treaty on the Functioning of the European Union, both notions of 'third

country' and 'third State' are often used interchangeably (para. 39).

The CJ also carried out a comparison of the different language versions of the TFEU, as well as the BEREC Regulation. It found that in some languages, the TEU and the TFEU, 'use the terms 'third State' and 'third country' together' (para. 41). Something similar can be observed when comparing the different language versions of the BEREC Regulation. As the CJ points out, 'in the Bulgarian, Estonian, Latvian, Lithuanian, Polish and Slovenian versions, only the term 'third State' is used' (para. 46). Therefore, the CJ decided to reject General Court's broad interpretation of the expression 'third country'. Nonetheless, at the same time, it considered that this does not prevent Kosovo's NRA from participating in the BEREC framework. Kosovo can be considered a 'third country' and that would not have implications for those Member States which do not recognise Kosovo as an independent State, as it is expressly foreseen in the Stabilization Agreement (para. 52). Furthermore, the CJ highlighted that the Stabilization Agreement expressly provides the legal basis for Kosovo to participate in the BEREC (para. 56). In this regard, Article 111 of the Stabilization Agreement states that Kosovo and the EU 'shall, in particular, strengthen cooperation in the area of electronic communications networks and electronic communications service'.

Paradoxically, in the end, the CJ decided to set aside the decision of the General Court as the decision to admit the Kosovo NRA to the BEREC framework was not adopted through the correct procedure. The agreement for the participation of the Kosovo NRA should have been established by the BEREC and the BEREC Office, prior to approval of the Commission (para. 117). The CJ considered that the fact the Commission adopted such decision unilaterally 'would not be compatible with BEREC's independence and would go beyond the supervisory function assigned to the Commission' (para. 120).

The impact of C-632/20 P in the EU-Kosovo relationship

From a broader perspective, the CJ's judgment in C-632/20 P confirms the current status quo between Kosovo and the EU. It safeguards the position of those Member States which do not recognise Kosovo while allowing EU-Kosovo cooperation to progress. At the same time, establishing an equivalence between the notions of 'third country' and 'third State' avoids the creation of an artificial separation between two concepts which are often used interchangeably in EU legislation.

A more immediate consequence of this judgment was that it settled the question of whether Kosovo could participate in the BEREC and the BEREC Office. This explains why, in June 2023, the Management Board of the

BEREC Office adopted a Decision to establish a Working Agreement with the Kosovo NRA (Decision No MB/2023/07).

More on this topic

If you are interested in learning more key judicial decisions issued by the Court of Justice of the European Union (CJEU), have a look at our annual 'Recent Trends in the Case Law of the Court of Justice of the EU' seminar, where we will be reviewing and commenting on a number of key judicial decisions issued by the CJEU. These judicial decisions offer a first-time interpretation on certain EU legal instruments, give a new meaning to existing legal rules, or they adapt or re-examine past jurisprudence:

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