



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

23 September 2020*

(External relations – Technical cooperation – Electronic communications – Regulation (EU) 2018/1971 – Body of European Regulators for Electronic Communications – Article 35(2) of Regulation 2018/1971 – Participation of regulatory authorities of third countries in that body – Participation of the national regulatory authority of Kosovo – Concept of third country – Error of law)

In Case T-370/19,

Kingdom of Spain, represented by S. Centeno Huerta, acting as Agent,

applicant,

v

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

defendant,

ACTION pursuant to Article 263 TFEU seeking annulment of the decision of the Commission of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 26),

THE GENERAL COURT (Ninth Chamber),

composed of M.J. Costeira (Rapporteur), President, M. Kancheva and T. Perišin, Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

- 1 By Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ 2009 L 337, p. 1), the EU legislature decided to create BEREC and entrust it with contributing to the development and better functioning of the internal market for electronic communications networks and services, by aiming to ensure a consistent application of the EU

* Language of the case: Spanish.

regulatory framework for electronic communications. Under that regulation, BEREC was required to perform its tasks independently, in cooperation with national regulatory authorities ('NRAs') and the European Commission. Likewise, it was required to promote cooperation between NRAs themselves and between NRAs and the Commission.

- 2 In terms of Article 4 of Regulation No 1211/2009, BEREC was composed of a Board of Regulators. According to Article 6 of that regulation, BEREC was assisted by the Office, under the guidance of the Board of Regulators. The Office comprised, in particular, a Management Committee. The Board of Regulators and the Management Committee were both composed of one member per Member State, who was the head or nominated high-level representative of the NRA established in each Member State. Pursuant to Article 4(3) of that regulation, NRAs from European Economic Area (EEA) States and from States that were candidates for accession had observer status and participated in the Board of Regulators of BEREC and the Management Committee of the Office. Third countries other than EEA countries and candidate countries were excluded from participating in BEREC and its organs.
- 3 Furthermore, between 2001 and 2015, the European Union signed a number of stabilisation and association agreements ('SAAs') with the Western Balkan countries, which contain specific provisions on cooperation in the field of electronic communications. One such example is the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (OJ 2016 L 71, p. 3; 'the Kosovo SAA'), Article 111 of which lays down such provisions under the heading 'Electronic communications networks and services' and is worded as follows:

'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 The overall aim of the Kosovo SAA is, inter alia, to take concrete steps to realise Kosovo's European perspective and rapprochement with the European Union. However, Article 2 of the Kosovo SAA states that 'none of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step'.
- 5 On 6 February 2018, the Commission adopted a Communication to the European Parliament, the Council of the European Union, the European Economic and Social Committee and the Committee of the Regions, entitled 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans' (COM(2018) 65 final). In its communication, the Commission stated that it intends to launch a digital agenda for the Western Balkans, including steps to facilitate the lowering of roaming costs, to support the deployment of broadband, to develop digital society and, more generally, to support the adoption, implementation and enforcement of the *acquis* in the area of the digital single market.
- 6 On 22 June 2018, the Commission published a working document entitled 'Measures in support of a Digital Agenda for the Western Balkans' (SWD(2018) 360 final). One of the five main areas covered by that digital agenda concerns support for the adoption, implementation and enforcement of the *acquis* in the digital single market. One of the steps in that main area involves incorporating the Western Balkans into existing regulatory bodies or expert groups, such as BEREC, which is expressly mentioned. Section 8.3.1 of that document, dealing with BEREC, states that 'a closer relationship between EU and Western Balkans NRAs will help bring regulatory practice in the region closer to the

Union ... While four out of six Western Balkan economies are currently observers of BEREC, the BEREC Board agreed to work more closely with all six NRAs of the region. This will still be possible under the revised ... Regulation [No 1211/2009].

- 7 On 11 December 2018, the Parliament and the Council adopted Regulation (EU) 2018/1971 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 No 1211/2009 (OJ 2018 L 321, p. 1). That regulation came into force on 20 December 2018.
- 8 In particular, Article 35 of Regulation 2018/1971, headed ‘Cooperation with Union bodies, third countries and international organisations’, is worded as follows:

‘1. In so far as necessary in order to achieve the objectives set out in this Regulation and carry out its tasks, and without prejudice to the competences of the Member States and the institutions of the Union, BEREC and the BEREC Office may cooperate with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations.

To that end, BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements. Those arrangements shall not create legal obligations.

2. The Board of Regulators, the working groups and the Management Board shall be open to the participation of regulatory authorities of third countries with primary responsibility in the field of electronic communications, where those third countries have entered into agreements with the Union to that effect.

Under the relevant provisions of those agreements, working arrangements shall be developed specifying, in particular, the nature, extent and manner in which the regulatory authorities of the third countries concerned will participate without the right to vote in the work of BEREC and of the BEREC Office, including provisions relating to participation in the initiatives carried out by BEREC, financial contributions and staff to the BEREC Office. As regards staff matters, those arrangements shall, in any event, comply with the Staff Regulations.

3. As part of the annual work programme referred to in Article 21, the Board of Regulators shall adopt BEREC’s strategy for relations with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations concerning matters for which BEREC is competent. The Commission, BEREC and the BEREC Office shall conclude an appropriate working arrangement for the purpose of ensuring that BEREC and the BEREC Office operate within their mandate and the existing institutional framework.’

- 9 On 18 March 2019, the Commission adopted six decisions concerning the participation in BEREC of the NRAs of the six countries of the Western Balkans. Those decisions were taken on the basis of the new legal framework and, in particular, Article 35(2) of Regulation 2018/1971, governing the participation of NRAs of third countries in the organs of BEREC and the BEREC Office, with the aim of ensuring the participation of the NRAs of those six countries in the work of BEREC and the BEREC Office, in accordance with the digital agenda for the Western Balkans mentioned in paragraphs 5 and 6 above.
- 10 The six decisions in question include the decision of the Commission of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 26; ‘the contested decision’). In that decision, the Commission established that the NRA of Kosovo with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services could

participate in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office. Furthermore, with reference to Article 111 of the Kosovo SAA, recital 3 of the contested decision states that the European Union and Kosovo have entered into an agreement within the meaning of Article 35(2) of Regulation 2018/1971. Moreover, the contested decision also refers in recital 1 thereof to Article 17 TEU.

- 11 On 24 April 2019, the Commission sent a letter to the Irish communications regulatory authority, in its capacity as Chair of BEREC, setting out the criteria which it had drawn up concerning the participation of NRAs of third countries in BEREC and the BEREC Office. In that letter, the Commission presented, inter alia, the case of the Western Balkans, concerning six partners which have entered into SAAs with the European Union, namely four candidates for accession to the European Union (Albania, North Macedonia, Montenegro and Serbia) and two potential candidates (Bosnia and Herzegovina and Kosovo). It stated that, in each case, the SAAs are regarded as agreements within the meaning of Article 35(2) of Regulation 2018/1971 and explained that the six decisions adopted on 18 March 2019 lay down the necessary binding provisions as to the nature, extent and manner of participation in BEREC and the BEREC Office.

Procedure and forms of order sought by the parties

- 12 The Kingdom of Spain brought this action by application lodged at the Court Registry on 19 June 2019.
- 13 The Commission lodged its defence at the Court Registry on 12 August 2019.
- 14 The reply was lodged at the Court Registry on 25 October 2019.
- 15 The rejoinder was lodged at the Court Registry on 6 December 2019.
- 16 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Ninth Chamber, to which the present case was accordingly allocated.
- 17 In response to a measure of organisation of procedure ordered by the Court on 3 April 2020, the parties stated that they did not wish to present oral argument. Accordingly, the General Court (Ninth Chamber) decided, pursuant to Article 106(3) of the Rules of Procedure, to rule on the action without an oral part of the procedure.
- 18 The Kingdom of Spain claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 19 The Commission contends that the Court should:
- dismiss the action;
 - order the Kingdom of Spain to pay the costs.

Law

20 In support of its action, the Kingdom of Spain raises three pleas in law. The first plea alleges infringement of Article 35 of Regulation 2018/1971 in so far as Kosovo is not a ‘third country’. The second plea alleges infringement of that article in so far as there is no ‘agreement’ for the participation of the NRA of Kosovo in BEREC. The third plea alleges infringement of Article 35 of Regulation 2018/1971 in so far as the Commission departed from the established procedure for the participation of NRAs of third countries in BEREC.

First plea in law: infringement of Article 35 of Regulation 2018/1971 in so far as Kosovo is not a ‘third country’

21 By its first plea, the Kingdom of Spain submits that by allowing, in the contested decision, the NRA of Kosovo to participate in the Board of Regulators and working groups of BEREC and in the Management Board of the BEREC Office, the Commission infringed Article 35 of Regulation 2018/1971 in so far as that provision restricts such participation to NRAs of ‘third countries’. According to the Kingdom of Spain, since Kosovo is not legally a ‘third country’, the necessary conditions for the application of that article to Kosovo are not met.

22 The Kingdom of Spain argues that the wording of Article 35(2) of Regulation 2018/1971 is clear and confirmed by recital 34 of that regulation, which also refers to the possibility of such participation on the part of NRAs of ‘third countries’. It asserts that participation in BEREC, as provided for in Article 35(2), presupposes the participation of an authority linked to an organisation in the nature of a State, with the result that only a State can have an NRA. The Kingdom of Spain also notes that recital 34 cites EEA and European Free Trade Association (EFTA) States and candidates for accession as examples of third countries.

23 The Kingdom of Spain states that, in the contested decision, the Commission implicitly treated Kosovo in the same way as a ‘third country’ within the meaning of Article 35 of Regulation 2018/1971, even though it had no legal basis for doing so. It observes that the fact that Kosovo concluded an SAA with the European Union does not make it a ‘third country’ within the meaning of that provision and that Kosovo cannot be treated like EEA or EFTA States or candidates for accession. It also states that Article 2 of the Kosovo SAA confirms that approach.

24 In addition, the Kingdom of Spain submits that it is not necessary for the NRA of Kosovo to participate in BEREC in order to comply with Article 111 of the Kosovo SAA. The situation in Kosovo is similar to the fifth case mentioned in the Commission’s letter of 24 April 2019, namely that of ‘other countries’. Article 111 refers in general terms to cooperation in the electronic communications sector and is intended to strengthen the independence of NRAs, but it does not provide for any participation in European bodies in that area.

25 The Commission disputes the Kingdom of Spain’s arguments and contends that the first plea should be rejected.

26 By its first plea, the Kingdom of Spain argues, in essence, that the Commission infringed Article 35(2) of Regulation 2018/1971 in so far as in the contested decision it treated Kosovo in the same way as a ‘third country’, when that provision presupposes the participation of an authority linked to an organisation in the nature of a State, with the result that only a sovereign State can have an NRA, which is not the case with Kosovo.

27 It is, therefore, for the Court to examine the scope of the concept of ‘third country’ within the meaning of Article 35(2) of Regulation 2018/1971 and, in particular, to determine whether that concept is equivalent to that of ‘third State’, as the Kingdom of Spain claims.

- 28 First of all, it should be noted 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.
- 29 The provisions of the TFEU refer to both ‘third countries’ and ‘third States’. However, it should be noted that many provisions dealing with issues concerning external relations use the term ‘third countries’, since international society is not made up of ‘States’ alone. In particular, Part Five of the TFEU, headed ‘The Union’s external action’, reflects the fact that international society is composed of various actors and, therefore, contains Title III on cooperation ‘with third countries’ and Title VI on relations ‘with international organisations and third countries’.
- 30 It follows 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’. Thus, the European Union may conclude international agreements with territorial entities, covered by the flexible concept of ‘country’, which have the capacity to conclude treaties under international law but which are not necessarily ‘States’ for the purposes of international law. To claim the contrary would be to create a legal vacuum in the European Union’s external relations.
- 31 In that connection, it should be pointed out that the European Union has concluded a number of international agreements with entities other than sovereign States. These include the agreements concluded with the Palestine Liberation Organisation (PLO), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Macao Special Administrative Region of the People’s Republic of China.
- 32 It should also be noted that the European Union has entered into several international agreements with Kosovo, thus recognising its capacity to conclude such agreements. In particular, it concluded the Kosovo SAA under Article 217 TFEU and the Framework Agreement between the European Union and Kosovo on the general principles for the participation of Kosovo in Union programmes (OJ 2017 L 195, p. 3) in accordance with Article 212 TFEU. The conclusion of those agreements was legally possible only because the concept of ‘third country’ referred to in those provisions of the TFEU could be construed broadly, thereby allowing the European Union to regard Kosovo as such.
- 33 However, on no occasion has the European Union 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 the 17th recital and Article 2 of the Kosovo SAA, which make clear that that agreement does not constitute recognition of Kosovo by the European Union as an independent State or affect the individual positions of the Member States on its status. Such precautions also appear in other EU acts concerning Kosovo, such as the framework agreement referred to in paragraph 32 above and the basic acts establishing various EU programmes, such as Erasmus + and Horizon 2020, in which Kosovo is allowed to participate as a ‘third country’.
- 34 Those precautions taken by the European Union in acts concerning Kosovo, whereby express reference is made to the non-recognition of the State of Kosovo, cannot, contrary to what the Kingdom of Spain claims, be interpreted as excluding Kosovo from the concept of ‘third country’. Rather, 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’.
- 35 It follows that the concept of ‘third country’ referred to in EU primary law, particularly Articles 212 and 216 to 218 TFEU, in order to designate entities subject to international law which may have rights and obligations, cannot be construed differently when the same concept appears in a provision of secondary legislation such as Article 35(2) of Regulation 2018/1971. Furthermore, there is nothing to suggest that the concept of ‘third country’ mentioned in that last provision should have any other interpretation than that contained in those provisions of the TFEU.

36 Consequently, the concept of ‘third country’ within the meaning of Article 35(2) of Regulation 2018/1971 cannot, contrary to the Kingdom of Spain’s submissions, be equated with that of ‘third State’. The concept of ‘third country’ has a broader scope which goes beyond sovereign States alone, with the result that Kosovo is capable of falling within it, without prejudice to the position of the European Union or its Member States as regards the status of Kosovo as an independent State. Similarly, as a ‘third country’, Kosovo may also have public authorities, such as the NRA of Kosovo, with the result that the Kingdom of Spain’s assertion that ‘only a State can have an NRA’ cannot reasonably succeed.

37 Accordingly, by finding in the contested decision that Kosovo was a ‘third country’ within the meaning of Article 35(2) of Regulation 2018/1971, the Commission did not infringe that provision.

38 The Kingdom of Spain’s first plea in law must therefore be rejected.

Second plea in law: infringement of Article 35 of Regulation 2018/1971 in so far as there is no ‘agreement’ for the purposes of the participation of the NRA of Kosovo in BEREC

39 By the second plea, the Kingdom of Spain submits that the Commission infringed Article 35 of Regulation 2018/1971 in so far as there is no ‘agreement’, within the meaning of paragraph 2 of that provision, for the purposes of the participation of the NRA of Kosovo in the Board of Regulators, working groups and Management Board of BEREC.

40 The Kingdom of Spain considers that, contrary to what is stated in the contested decision, Article 111 of the Kosovo SAA does not permit the inference that Kosovo concluded an agreement with the European Union for participation in BEREC. That provision merely envisages the strengthening of cooperation to enable Kosovo to adopt the EU *acquis*; it does not in any way provide for its participation in European bodies. Consequently, the participation of the NRA of Kosovo in BEREC would go beyond that cooperation and the objective set by that provision.

41 The Kingdom of Spain maintains that, in the contested decision and in its letter of 24 April 2019, the Commission confused ‘cooperation’ under Article 35(1) of Regulation 2018/1971 and Article 111 of the Kosovo SAA with ‘incorporation’ under Article 35(2) of Regulation 2018/1971. The contested decision is not limited to ‘cooperation’, but gives concrete expression to the ‘incorporation’ of the NRA of Kosovo into BEREC. An NRA’s ‘cooperation’ with BEREC should be distinguished from its ‘incorporation’ into or ‘participation’ in BEREC’s European bodies, since the two situations covered by Article 35 are different in scope and nature.

42 The Kingdom of Spain concludes from this that the contested decision provides for incorporation into the structure of BEREC, which is not envisaged in either the Kosovo SAA or any other agreement entered into to that effect with the European Union. Thus, the Commission’s ‘broad’ interpretation of Article 35(2) of Regulation 2018/1971 is incorrect.

43 The Commission disputes those arguments and contends that the second plea should be rejected.

44 By its second plea, the Kingdom of Spain submits, in essence, that the Commission infringed Article 35(2) of Regulation 2018/1971 in so far as it found in the contested decision that, as regards Kosovo, there was an ‘agreement with the Union’ within the meaning of that provision, for the purposes of the participation of the NRA of Kosovo in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office. According to the Kingdom of Spain, Article 111 of the Kosovo SAA does not permit the inference that Kosovo concluded an ‘agreement’ with the European Union for participation in BEREC.

- 45 It is, therefore, for the Court to examine the scope of the concept of ‘agreement with the Union to that effect’, referred to in Article 35(2) of Regulation 2018/1971, and then to determine whether the Kosovo SAA, particularly Article 111 thereof, falls within that concept.
- 46 It should be pointed out that, unlike Article 35(1) of Regulation 2018/1971, Article 35(2) of that regulation makes the participation of NRAs of third countries in the competent organs of BEREC subject to a twofold condition: first, there must be an ‘agreement’ between the third country concerned and the European Union and, secondly, the agreement must have been entered into ‘to that effect’.
- 47 Concerning the first condition relating to the existence of an ‘agreement with the Union’, it is apparent from the context in which that wording appears that it refers to an international agreement concluded between two legal persons governed by public international law, namely the European Union and the third country concerned. The Kosovo SAA is, therefore, certainly capable of constituting such an agreement, since it is binding on the parties under public international law.
- 48 As for the second condition requiring the agreement to have been entered into ‘to that effect’, that expression indicates that the agreements concerned must contain provisions which serve as a basis for cooperation between the European Union and the third country concerned in the area in question, in this instance ‘the field of electronic communications’, as expressly stated in the first subparagraph of Article 35(2) of Regulation 2018/1971. The meaning of that expression is, moreover, made clear in recital 34 of that regulation, in that the latter refers to ‘EEA EFTA States and candidate countries’ as examples of ‘third countries hav[ing] entered into agreements with the Union to that effect’.
- 49 In that connection, it should be observed that the countries of the Western Balkans which are candidates for accession to the European Union (namely Albania, North Macedonia, Montenegro and Serbia) have concluded SAAs with the European Union which have the same subject matter as the Kosovo SAA and contain provisions that are very similar, in their wording and context, to Article 111 of the Kosovo SAA. That is the case in particular of Article 104 of the SAA with Albania (OJ 2009 L 107, p. 166), Article 106 of the SAA with Montenegro (OJ 2010 L 108, p. 3) and Article 106 of the SAA with Serbia (OJ 2013 L 278, p. 16), all of which are considered to be agreements entered into with the European Union ‘to that effect’ within the meaning of Article 35(2) of Regulation 2018/1971, a fact which is moreover not disputed by the Kingdom of Spain. It follows that the Kosovo SAA, particularly Article 111 thereof, must also be regarded as an ‘agreement to that effect’.
- 50 Furthermore, that approach is confirmed if the wording of Article 111 of the Kosovo SAA and the object and purpose of that provision are examined.
- 51 First, the wording of Article 111 of the Kosovo SAA calls for a broad interpretation of its scope, since it provides that the European Union and Kosovo are ‘in particular, [to] strengthen cooperation’ in the area of electronic communications networks and services, the ultimate objective being the adoption by Kosovo of the EU *acquis* in that field. Strengthening cooperation in that area is thus a means by which the Kosovo SAA seeks to achieve its objective of having Kosovo implement the EU *acquis*. In addition, that article expressly refers to the ‘regulatory authorities’ in the area in question, which also suggests that that provision enables BEREC to be opened up to those authorities.
- 52 Secondly, the object and purpose of Article 111 of the Kosovo SAA seek to ensure the adoption by Kosovo of the EU *acquis* in the area of electronic communications networks and services. The adoption of the *acquis* would be greatly facilitated by the participation of the NRA of Kosovo in the work of BEREC and the BEREC Office, having regard to the role they play, which ranges from preparing EU legislation in that area to ensuring its consistent implementation. That participation is all the more justified where the work is directed at drawing up new EU legislation in the area in question. In that regard, it should be noted that Article 4(4) of Regulation 2018/1971 requires NRAs

and the Commission to take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC with the aim of ensuring the consistent implementation of the EU regulatory framework for electronic communications. Accordingly, since the main task of BEREC and the BEREC Office is to ensure the uniform application of the EU *acquis* in the area of electronic communications networks and services, as is apparent, in particular, from Article 3(2) and Article 4(1)(k) of Regulation 2018/1971, it is logical to find that all authorities whose task is to apply the same EU *acquis* in that area may, with due regard to, inter alia, the conditions laid down in Article 35(2) of Regulation 2018/1971, participate in the work of BEREC and the BEREC Office.

- 53 It follows that Article 111 of the Kosovo SAA provides for close cooperation, by expressly referring to the ‘strengthening’ of cooperation between the European Union and Kosovo. In that regard, the heading of Article 35 of Regulation 2018/1971 also uses the term ‘cooperation’, so that paragraphs 1 and 2 of that article are intended to govern arrangements for cooperation, which differ. That cooperation may take the form of a cooperation agreement under paragraph 1 or of participation, with limited rights, under paragraph 2. The latter form of cooperation corresponds to the close cooperation envisaged in Article 111, but cannot be at all equated with any kind of ‘incorporation’ of the NRA of Kosovo into the structure of BEREC, contrary to what the Kingdom of Spain claims. Moreover, Article 111 of the Kosovo SAA makes explicit reference to the importance of ‘regulatory authorities’ and their independence.
- 54 It is apparent from all those considerations that Article 111 of the Kosovo SAA is an agreement ‘to that effect’, within the meaning of Article 35(2) of Regulation 2018/1971.
- 55 Consequently, by finding in the contested decision that Article 111 of the Kosovo SAA supported the view that Kosovo had concluded an ‘agreement with the Union to that effect’, within the meaning of Article 35(2) of Regulation 2018/1971, the Commission did not infringe that provision.
- 56 The Kingdom of Spain’s second plea in law must, therefore, be rejected.

Third plea in law: infringement of Article 35 of Regulation 2018/1971 in so far as the Commission departed from the established procedure for the participation of NRAs of third countries in BEREC

- 57 By its third plea, the Kingdom of Spain submits that the contested decision infringes Article 35 of Regulation 2018/1971 in so far as the Commission departed from the established procedure for the participation of NRAs of third countries in BEREC. This also led to the adoption of a legal act with no legal basis whatsoever and created legal obligations vis-à-vis third parties, without specific powers having been conferred on the Commission for that purpose.
- 58 In particular, the Kingdom of Spain states that Article 35(2) of Regulation 2018/1971 provides that working arrangements are to be drawn up ‘under the relevant provisions of those agreements [for participation in BEREC]’ and that those provisions thus determine, in the first place, the detailed rules for establishing working arrangements. A participation agreement between the European Union and the third country must therefore exist, since legal obligations are created vis-à-vis a third country with a view to its participation in BEREC. In the absence of such an agreement, as claimed in the second plea, the Commission laid down those provisions unilaterally in the contested decision, in breach of the procedure for determining working arrangements provided for in Article 35(2) of Regulation 2018/1971.
- 59 In that regard, the Kingdom of Spain states that ‘relevant provisions’ within the meaning of Article 35(2) of Regulation 2018/1971 can be laid down only in the agreement for participation in BEREC. The fact that those provisions are not stipulated in such an agreement does not give the

Commission power to lay them down unilaterally, outside the framework of an international agreement, contrary to what it stated in its letter of 24 April 2019, in which it declared itself competent to adopt binding working arrangements as needed.

- 60 In addition, the Kingdom of Spain asserts that the fact of the matter is that the Commission adopted an act having legal effects without any legal basis for that purpose. Although the contested decision mentions Article 17(1) TEU as the legal basis, that provision does not constitute a sufficient legal basis for the Commission to adopt unilaterally acts providing for the participation of ‘third countries’ in European bodies. That provision confers on the Commission a general power to exercise coordinating functions generally, but not in a specific field.
- 61 Furthermore, according to the Kingdom of Spain, Regulation 2018/1971 also does not confer on the Commission the power to lay down ‘relevant provisions’, within the meaning of Article 35(2) of that regulation, in the event of lacunae in the participation agreement. The Commission cannot therefore, by unilateral decision, establish those relevant provisions and the working arrangements implementing them without Regulation 2018/1971 having conferred power on it to do so.
- 62 Moreover, the Kingdom of Spain asserts that, contrary to what the Commission stated in its letter of 24 April 2019, Regulation 2018/1971 did not confer power on it to adopt binding working arrangements as needed. First, Article 35(1) of that regulation, which does not apply in the instant case, does not confer power on the Commission to draw up binding working arrangements; it only gives the Commission power to approve working arrangements – drawn up by BEREC and the BEREC Office – which do not create legal obligations. Secondly, Article 35(2) of that regulation does not allocate any role to the Commission, since it is not mentioned in that provision.
- 63 The Kingdom of Spain concludes from this that, in the absence of relevant provisions in the Kosovo SAA enabling participation in BEREC, the Commission cannot, by unilateral decision, adopt the necessary provisions to achieve the objective of participation in BEREC, which impose obligations on Kosovo. That role can be performed only by the Stabilisation and Association Council, established by Article 126 of the Kosovo SAA, since that body alone is empowered to take binding decisions for Kosovo and for the European Union under the Kosovo SAA, in accordance with Article 128 thereof.
- 64 The Commission disputes the arguments of the Kingdom of Spain and contends that the third plea should be rejected.
- 65 By its third plea, the Kingdom of Spain submits, in essence, that the Commission infringed the second subparagraph of Article 35(2) of Regulation 2018/1971 in so far as it unilaterally established, in the contested decision, ‘working arrangements’ within the meaning of that subparagraph, for the purposes of the participation of the NRA of Kosovo in the Board of Regulators and working groups of BEREC and the Management Board of the BEREC Office. According to the Kingdom of Spain, those binding working arrangements should be drawn up ‘under the relevant provisions of [the] agreements’ for participation in BEREC, so that those agreements alone should determine the detailed rules for establishing such working arrangements.
- 66 The Kingdom of Spain concludes from this that, by adopting the contested decision, the Commission not only departed from the procedure laid down in the second subparagraph of Article 35(2) of Regulation 2018/1971 for the participation of NRAs of third countries in BEREC, but also adopted a binding legal act without any legal basis, since it did not have the necessary powers for that purpose.
- 67 It is therefore for the Court to examine the procedure for determining working arrangements applying to the participation of NRAs of third countries in BEREC, referred to in the second subparagraph of Article 35(2) of Regulation 2018/1971, in order to ascertain whether the Commission had the power to establish those working arrangements unilaterally in the contested decision and whether the legal basis for that decision is valid.

- 68 It should be recalled that the second subparagraph of Article 35(2) of Regulation 2018/1971 is worded as follows: ‘Under the relevant provisions of those agreements [for the participation of NRAs of third countries in BEREC], working arrangements shall be developed specifying, in particular, the nature, extent and manner [of such participation], including provisions relating to participation in the initiatives carried out by BEREC, financial contributions and staff to the BEREC Office ...’
- 69 The Kingdom of Spain relies in particular on the wording of the second subparagraph of Article 35(2) of Regulation 2018/1971 to argue that only agreements for participation in BEREC should determine the detailed rules for establishing those ‘working arrangements’. However, such an approach is difficult to reconcile with the practical effect of that provision. If the nature, extent and manner of that participation had to be set out in detail beforehand in the participation agreements themselves, that provision – the very purpose of which is to provide for the adoption of those working arrangements – would be rendered redundant and would thus no longer serve any purpose.
- 70 It follows that the words ‘relevant provisions of th[e] agreements’, mentioned in the second subparagraph of Article 35(2) of Regulation 2018/1971, cannot mean that the participation agreement concerned must already contain detailed provisions relating to the participation in BEREC. Rather, the reference to the ‘relevant provisions of th[e] agreements’, preceded by the word ‘under’, is intended to show that the ‘working arrangements’ must be adopted ‘in accordance with’ the provisions of those participation agreements.
- 71 The Kingdom of Spain nonetheless argues that an agreement with the third country concerned is necessary in order to specify the details of its authorities’ participation in BEREC, since obligations are created vis-à-vis those authorities. According to the Kingdom of Spain, there is no such agreement in respect of Kosovo.
- 72 In that regard, it should be recalled that, as is apparent from the examination of the second plea, there is a participation ‘agreement’ between Kosovo and the European Union within the meaning of the first subparagraph of Article 35(2) of Regulation 2018/1971. Furthermore, it follows from the considerations set out in paragraphs 69 and 70 above that such an agreement need not necessarily contain detailed provisions relating to the participation in BEREC. Moreover, Regulation 2018/1971 does not require the nature, extent and manner of that participation to be the subject of a formal agreement or bilateral instrument with the third country concerned. In general terms, 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.
- 73 The Kingdom of Spain also submits that the contested decision has no legal basis, since the Commission does not have the necessary powers to draw up working arrangements applying to the participation of the NRA of Kosovo in BEREC and the BEREC Office.
- 74 In that regard, the Commission states that, in the absence of an express power in Article 35(2) of Regulation 2018/1971, it considered it more appropriate to refer, in recital 1 of the contested decision, to Article 17 TEU.
- 75 It should be noted that the contested decision mentions Article 17 TEU in recital 1. In particular, that recital states that ‘Article 17(1) of the Treaty on European Union lists the powers of the Commission and provides that the Commission is to promote the general interest of the Union and take appropriate initiatives to that end, exercise coordinating, executive and management functions, as laid down in the Treaties, and ensure the Union’s external representation, with the exception of the common foreign and security policy and other cases provided for in the Treaties’.

- 76 It should also be noted that the BEREC Office is a decentralised agency of the European Union responsible for the application of EU law. That agency enjoys derived powers that normally lie with the Commission by virtue of its executive functions and powers of external representation, since what is in issue is cooperation with NRAs of third countries, in accordance with Article 17 TEU.
- 77 It follows that powers which have not been expressly delegated to an agency of the European Union under a legislative act remain within the competence of the Commission. Since neither Regulation 2018/1971 nor any other EU legislation expressly conferred on the BEREC Office or any other body the power to draw up working arrangements applying to the participation of NRAs of third countries, including the NRA of Kosovo, that power lies with the Commission.
- 78 That conclusion is borne out by the different wording used in Article 35(1) and Article 35(2) of Regulation 2018/1971. Article 35(1) expressly delegates to BEREC and the BEREC Office the power to draw up ‘working arrangements’, but this is subject to ‘prior approval by the Commission’, which thus plays a supervisory role. Article 35(2), on the other hand, does not provide for any such delegation of power. That power therefore continues to fall within the competence of the Commission, enabling it to adopt ‘working arrangements’ in terms of Article 35(2) of that regulation unless the international agreement concerned provides for another procedure, as is the case for EEA Member States.
- 79 It is, therefore, for the Commission to implement the legislative requirements under the powers conferred on it by Article 17 TEU and it cannot be criticised for referring to that provision in recital 1 of the contested decision, in the absence of a power expressly enshrined in Article 35(2) of Regulation 2018/1971.
- 80 Furthermore, the Kingdom of Spain argues that a general provision such as Article 17 TEU, which provides for cooperation in general, cannot be used as a basis for the adoption of the contested decision.
- 81 In that connection, it must be pointed out that, as regards the Council’s powers, the Court of Justice has acknowledged that Article 16 TEU may be used as a basis for certain powers of the Council (judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 40). Consequently, if that is the situation with respect to Article 16 TEU, there is no reason why such an interpretation should not be applied to Article 17 TEU, which is the equivalent provision for the Commission. Accordingly, contrary to what the Kingdom of Spain argues, the fact that Article 17 TEU is a general provision does not preclude it from constituting a sufficient legal basis.
- 82 It follows from all the foregoing considerations that the Commission had the power to establish unilaterally, in the contested decision, ‘working arrangements’ applying to the participation of NRAs of third countries in BEREC, as referred to in the second subparagraph of Article 35(2) of Regulation 2018/1971, with the result that it cannot be criticised for departing in that decision from the procedure laid down in that provision. Similarly, it cannot be successfully argued that the contested decision lacked a legal basis.
- 83 In consequence, the third plea in law put forward by the Kingdom of Spain must also be rejected and the action dismissed in its entirety.

Costs

- 84 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 85 As the Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Kingdom of Spain to pay the costs.**

Costeira

Kancheva

Perišin

Delivered in open court in Luxembourg on 23 September 2020.

[Signatures]