

JUDGMENT OF THE COURT (Grand Chamber)

20 May 2008

(Action for annulment – [Article 40 TEU]– Common foreign and security policy – Decision 2004/833/CFSP – Implementation of Joint Action 2002/589/CFSP – Combating the proliferation of small arms and light weapons – [Union] competence – Development cooperation policy)

In Case C-91/05,

ACTION for annulment under [Article 263 TFEU], brought on 21 February 2005,

**Commission of the European [Union]**, represented by M. Petite, P.J. Kuijper and J. Enegren, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

**European Parliament**, represented by R. Passos, K. Lindahl and D. Gauci, acting as Agents, with an address for service in Luxembourg,

intervener,

v

**Council of the European Union**, represented by J.-C. Piris, R. Gosalbo Bono, S. Marquardt and E. Finnegan, acting as Agents,

defendant,

supported by:

**Kingdom of Denmark**, represented by A. Jacobsen, C. Thorning and L. Lander Madsen, acting as Agents,

**Kingdom of Spain**, represented by N. Díaz Abad, acting as Agent,

**French Republic**, represented by G. de Bergues, E. Belliard and C. Jurgensen, acting as Agents,

**Kingdom of the Netherlands**, represented by M. de Grave, C. Wissels and H.G. Sevenster, acting as Agents,

**Kingdom of Sweden**, represented by A. Falk, acting as Agent,

**United Kingdom of Great Britain and Northern Ireland**, represented by R. Caudwell and E. Jenkinson, acting as Agents, assisted by A. Dashwood, barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts (Rapporteur), A. Tizzano and G. Arestis, Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský and J.-C. Bonichot, Judges,

Advocate General: P. Mengozzi,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 5 December 2006,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2007,

gives the following

## Judgment

- 1 By its action, the Commission of the European [Union] asks the Court to annul Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons (OJ 2004 L 359, p. 65; ‘the contested decision’) and to declare illegal and hence inapplicable the Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP (OJ 2002 L 191, p. 1; ‘the contested joint action’), in particular Title II thereof.

### Legal context and background to the dispute

#### *The Cotonou Agreement*

- 2 On 23 June 2000 the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (‘the ACP States’) of the one part, and the European [Union] and its Member States, of the other part, was signed in Cotonou, Benin (OJ 2000 L 317, p. 3; ‘the Cotonou Agreement’); it was approved on behalf of the [Union] by Council Decision 2003/159/EC of 19 December 2002 (OJ 2003 L 65, p. 27). It entered into force on 1 April 2003.
- 3 Article 1 of the Cotonou Agreement, entitled ‘Objectives of the partnership’, states:

‘The [Union] and its Member States, of the one part, and the ACP States, of the other part, hereinafter referred to as the “Parties” hereby conclude this Agreement in order to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.

The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.

These objectives and the Parties’ international commitments shall inform all development strategies and shall be tackled through an integrated approach taking account at the same time of the political, economic, social, cultural and environmental aspects of development. The partnership shall provide a coherent support framework for the development strategies adopted by each ACP State.

...

4 Article 11 of the Cotonou Agreement, entitled 'Peace-building policies, conflict prevention and resolution', states:

1. The Parties shall pursue an active, comprehensive and integrated policy of peace-building and conflict prevention and resolution within the framework of the Partnership. This policy shall be based on the principle of ownership. It shall in particular focus on building regional, sub-regional and national capacities, and on preventing violent conflicts at an early stage by addressing their root-causes in a targeted manner, and with an adequate combination of all available instruments.

2. The activities in the field of peace-building, conflict prevention and resolution shall in particular include support for balancing political, economic, social and cultural opportunities among all segments of society, for strengthening the democratic legitimacy and effectiveness of governance, for establishing effective mechanisms for the peaceful conciliation of group interests, for bridging dividing lines among different segments of society as well as support for an active and organised civil society.

3. Relevant activities shall also include, inter alia, support for mediation, negotiation and reconciliation efforts, for effective regional management of shared, scarce natural resources, for demobilisation and reintegration of former combatants into the society, for addressing the problem of child soldiers, as well as for suitable action to set responsible limits to military expenditure and the arms trade, including through support for the promotion and application of agreed standards and codes of conduct. In this context, particular emphasis shall be given to the fight against anti-personnel landmines as well as to addressing an excessive and uncontrolled spread, illegal trafficking and accumulation of small arms and light weapons.

...<sup>2</sup>

5 Under Articles 6 to 10 of Annex IV of the Cotonou Agreement, entitled 'Implementation and Management Procedures', a regional support strategy and a regional indicative programme were drawn up in a document signed on 19 February 2003 by the Commission, of the one part, and by the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU), of the other.

6 This document highlights, in section 2.3.1, entitled 'Security and conflict prevention', 'the importance of controlling the traffic in small arms', noting that 'there is a moratorium on export and import supported by the United Nations'. Section 6.4.1, entitled 'Support for a regional policy of conflict prevention and good governance', refers to support which may be given to back up the United Nations in carrying out priority measures under the action plan to implement a moratorium on the import, export and production of small arms.

7 Following a request from ECOWAS, in 2004 the Commission started preparing a financing proposal for conflict prevention and peace-building operations. According to the Commission, the largest single block of this financing was to be allocated to the ECOWAS Small Arms Control Programme.

#### *The contested joint action*

8 On 12 July 2002, the Council of the European Union adopted, on the basis of [Article 28 TEU], the contested joint action, which repealed and replaced Council Joint Action 1999/34/CFSP of 17 December 1998, adopted on the basis of [Article 28 TEU], on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons (OJ 1999 L 9, p. 1).

9 According to Article 1(1) of the contested joint action, '[t]he objectives of this Joint Action are:

- to combat, and contribute to ending, the destabilising accumulation and spread of small arms,

- to contribute to the reduction of existing accumulations of these weapons and their ammunition to levels consistent with countries' legitimate security needs, and
- to help solve the problems caused by such accumulations.'

10 Title I of the contested joint action, entitled 'Principles on preventive and reactive aspects', sets out the programme on the basis of which the European Union will aim to build consensus in the relevant regional and international forums. To this end, it sets out the principles and measures which must be realised in order to prevent the further destabilising accumulation of small arms (Article 3) and to reduce existing accumulations of small arms and their ammunition (Article 4).

11 Among the principles and measures which must be realised in order to prevent the further destabilising accumulation of small arms, Article 3 of the contested joint action refers to commitments by all the countries concerned regarding the production, export, import and holding of those arms, as well as the establishment and maintenance of national inventories of weapons and the establishment of restrictive national weapons legislation.

12 Among the principles and measures which must be realised in order to reduce existing accumulations of small arms and their ammunition, Article 4 of the contested joint action mentions the provision of assistance as appropriate to countries requesting support for controlling or eliminating surplus small arms on their territory, and the promotion of confidence-building measures and incentives to encourage the voluntary surrender of surplus or illegally-held small arms and their ammunition.

13 Title II of the contested joint action, headed 'Contribution by the Union to specific actions', provides, in particular, for financial and technical assistance to programmes and projects which make a direct contribution to the principles and measures referred to in Title I.

14 Article 6(2) of the joint action states:

'In providing such assistance, the Union shall take into account in particular the recipients' commitments to comply with the principles mentioned in Article 3; their respect for human rights; their compliance with international humanitarian law and the protection of the rule of law; and their compliance with their international commitments, in particular with regard to existing peace treaties and international arms control agreements.'

15 Under Article 7(1) of the contested joint action, the Council is to decide on the allocation of the financial and technical assistance referred to in Article 6(1) of the joint action, on the priorities for the use of those funds and on the conditions for implementing specific actions of the Union. Article 7(2) provides that '[t]he Council shall decide on the principle, arrangements and financing of such projects on the basis of concrete and properly-costed project proposals and on a case-by-case basis, without prejudice to Member States' bilateral contributions and operation of the [Union]'

16 Article 8 of the contested joint action provides:

'The Council notes that the Commission intends to direct its action towards achieving the objectives and the priorities of this Joint Action, where appropriate by pertinent [Union] measures.'

17 Article 9(1) of the joint action provides:

'The Council and the Commission shall be responsible for ensuring the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies. For this purpose, Member States and the Commission shall submit any relevant information to the relevant Council bodies. The Council and the Commission shall ensure implementation of their respective action, each in accordance with its powers.'

*The contested decision*

18 On 2 December 2004, the Council adopted the contested decision, which implements the contested joint action with a view to a contribution by the Union to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons. As its legal basis, the contested decision refers to the contested joint action, in particular Article 3 thereof, in conjunction with [Article 31 (2) to (4) TEU].

19 The preamble of the contested decision contains the following recitals:

- (1) The excessive and uncontrolled accumulation and spread of small arms and light weapons poses a threat to peace and security and reduces the prospects for sustainable development; this is particularly the case in West Africa.
- (2) In pursuing the objectives set out in Article 1 of [the contested] Joint Action, the European Union envisages operating within the relevant international forums to promote confidence-building measures. This Decision is accordingly intended to implement the said Joint Action.
- (3) The European Union considers that a financial contribution and technical assistance would help to consolidate the [ECOWAS] initiative concerning small arms and light weapons.
- (4) The European Union therefore intends to offer financial support and technical assistance to ECOWAS in accordance with Title II of [the contested] Joint Action.<sup>7</sup>

20 Under Article 1 of the contested decision, the Union is to contribute towards implementing projects in the framework of the ECOWAS Moratorium on the Import, Export and Manufacture of Small Arms and Light Weapons. To that end, it is to offer a financial contribution and technical assistance in order to set up the Light Weapons Unit within the ECOWAS Technical Secretariat and to convert the Moratorium into a Convention on small arms and light weapons between the ECOWAS Member States.

21 Article 3 of the contested decision provides:

‘The Commission shall be entrusted with the financial implementation of this Decision. To that end, it shall conclude a financing agreement with ECOWAS on the conditions for use of the European Union contribution, which shall take the form of a grant. Amongst other things, this grant shall cover, over a period of 12 months, salaries, travel expenses, supplies and equipment necessary for setting up the Light Weapons Unit within the ECOWAS Technical Secretariat and converting the Moratorium into a Convention on small arms and light weapons between the ECOWAS Member States. ...’

22 Article 4(2) of the decision provides:

‘The Presidency and the Commission shall submit to the relevant Council bodies regular reports on the consistency of the European Union’s activities in the field of small arms and light weapons, in particular with regard to its development policies, in accordance with Article 9(1) of [the contested] Joint Action. More particularly, the Commission shall report on the aspects referred to in the first sentence of Article 3. This information shall be based, amongst other things, on regular reports to be supplied by ECOWAS under its contractual relationship with the Commission.’

23 When the draft of the contested decision was discussed by the Committee of Permanent Representatives on 24 November 2004, the Commission made the following declaration to the minutes of the Council meeting (document No 15236/04 PESC 1039 of 25 November 2004):

In the view of the Commission this Joint Action should not have been adopted and the project ought to have been financed from the 9th [European Development Fund – ‘EDF’] under the Cotonou Agreement. This is clearly borne out by Article 11(3) of the Cotonou Agreement which specifically mentions the fight against the accumulation of small arms and light weapons as a relevant activity. It is also reflected in the annotation to the relevant [Common Foreign and Security Policy – ‘CFSP’] budget line (19 03 02) in the 2004 budget, which excludes CFSP financing of such projects if they “are already covered by the provisions of the Cotonou Agreement...”.

The Joint Action for financing under the CFSP would have been eligible under the 9th EDF and fully coherent with the regional indicative programme with ECOWAS. This is demonstrated by the fact that the Commission is already preparing a financing proposal for an indicative amount of EUR 1.5 million to support the implementation of the ECOWAS moratorium on small arms and light weapons (SALW).

Finally, the Joint Action falls within the shared competences on which [Union] development policy and the Cotonou Agreement are based. Such areas of shared competences are just as much protected by [Article 40 TEU] as the areas of exclusive [Union] competence; otherwise [Article 40 TEU] would be deprived of a large part of its useful effect. The Commission reserves its rights in this matter.<sup>2</sup>

24 Taking the view that the contested decision was not adopted on the correct legal basis, and that by virtue of that fact [Article 40 TEU] was infringed, the Commission brought the present action.

#### **Forms of order sought by the parties**

25 The Commission claims that the Court should:

- annul the contested decision;
- declare illegal and hence inapplicable the contested joint action, in particular Title II thereof.

26 The Council contends that the Court should:

- dismiss the application for annulment of the contested decision as unfounded;
- dismiss the Commission’s application for a declaration of the inapplicability of the contested joint action as inadmissible and, in the alternative, as unfounded;
- order the Commission to pay the costs.

27 By order of the President of the Court of 7 September 2005, the European Parliament was granted leave to intervene in support of the form of order sought by the Commission.

28 By the same order, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council. By order of the President of the Court of 12 September 2005, the Kingdom of Denmark was granted leave to appeal in support of the form of order sought by the Council.

#### **Jurisdiction of the Court**



- 29 By the present action for annulment, brought under [Article 263 TFEU], the Commission is seeking a declaration that the Council, by adopting the contested decision, has encroached upon [Union] competences and, therefore, infringed [Article 40 TEU]. In so far as the contested decision is based on the contested joint action, the Commission relies on [Article 277 TFEU] in order to invoke the inapplicability of that joint action, in particular Title II thereof, on the ground that it also infringes [Article 40 TEU].
- 30 Without thereby calling in question the jurisdiction of the Court to rule on the action, the Council, supported by the Spanish and United Kingdom governments, submits, in particular with regard to the plea based on the illegality of the contested joint action, that the Court has no jurisdiction to rule on the legality of a measure falling within the CFSP.
- 31 In that regard, it follows from Article 46(f) EU [repealed] that the provisions of the [Treaty on the Functioning of the European Union] concerning the powers of the Court and the exercise of those powers are applicable to [Article 40 TEU].
- 32 Under [Article 40 TEU], none of the provisions of the [Treaty on the Functioning of the European Union] is to be affected by a provision of the Treaty on European Union (Case C-176/03 *Commission v Council* [2005] ECR I-7879, paragraph 38, and Case C-440/05 *Commission v Council* [2007] ECR I-0000, paragraph 52).
- 33 It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the Treaty on European Union and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the [Treaty on the Functioning of the European Union] on the [Union] (see, to that effect, Case C-170/96 *Commission v Council* [1998] ECR I-2763, paragraph 16; Case C-176/03 *Commission v Council*, paragraph 39; and Case C-440/05 *Commission v Council*, paragraph 53).
- 34 It follows that the Court has jurisdiction to consider the action for annulment brought by the Commission under [Article 263 TFEU] and, in that context, to consider the pleas invoked in accordance with [Article 277 TFEU] in so far as they allege an infringement of [Article 40 TEU].

## **The action**

### *Arguments of the parties*

- 35 The Commission, supported by the Parliament, claims that the contested decision should be annulled because it impinges upon competences conferred upon the [Union] in the area of development cooperation, thus infringing [Article 40 TEU].
- 36 The Commission and the Parliament take the view that [Article 40 TEU] establishes a ‘fixed’ boundary between the competences of the [Union] and those of the Union. If, in an area of shared competence, such as development cooperation policy, the Member States retain the competence to act by themselves, whether individually or collectively, to the extent that the [Union] has not yet exercised its competence, the same cannot be said for the Union which, under [Article 40 TEU], does not enjoy the same complementary competence, but must respect the competences of the [Union], whether exclusive or not, even if they have not been exercised. Therefore, there is an encroachment upon [Union] competences whenever the Council adopts, in the framework of the CFSP, an act which could properly have been adopted on the basis of the [Treaty on the Functioning of the European Union].
- 37 According to the Commission and the Parliament, the combating of the proliferation of small arms and light weapons, since it has become an integral part of development cooperation policy, falls within the scope of the competences conferred on the [Union] in that field. Cooperation in the

long-term development of a country can be effective only where there is a minimum degree of stability and democratic legitimacy. As part of that stability perspective, the policy of mine clearance and decommissioning of small arms and light weapons constitutes an indispensable means of achieving the objectives of development cooperation policy.

- 38 The Commission claims that the integration of the campaign against the proliferation of small arms and light weapons into [Union] development cooperation policy was established by the Cotonou Agreement, in particular Article 11(3) thereof.
- 39 The connection between the destabilising accumulation of small arms and light weapons and development cooperation policy is moreover recognised by the Council itself and by the international [Union].
- 40 According to the Commission, supported by the Parliament, the contested decision, by virtue of its objective and its content, falls within the scope of [Union] competences and could therefore properly have been adopted on the basis of the [Treaty on the Functioning of the European Union]. First, the objective of the contested decision is not only the promotion of peace and security, but also the improvement of the prospects for sustainable development in West Africa. Second, the strengthening of the Light Weapons Unit within the ECOWAS Technical Secretariat and the appointment of experts in order to draw up a draft convention on light weapons, as provided for in the annex to the contested decision, constitutes a typical form of assistance in the context of development cooperation planning, which does not require specific activities falling within the CFSP.
- 41 In so far as the contested decision is based on the contested joint action, the Commission, supported by the Parliament, is seeking to have the joint action, and in particular Title II thereof, declared illegal on the ground that it encroaches on [Union] competences. While certain aspects of the fight against the proliferation of small arms and light weapons can fall within the CFSP, in particular police or military action to collect weapons or begin destruction programmes, that does not apply to the measures of financial and technical assistance provided for under Title II of the joint action, which fall within [Union] competences in the field of development cooperation and of economic, financial and technical cooperation with third countries.
- 42 The Council, supported by all the intervening governments of the Member States, considers that there is no basis to claim infringement of [Article 40 TEU] since the campaign against the proliferation of small arms and light weapons does not fall within [Union] competences in the field of development cooperation policy or within any other [Union] competences.
- 43 With regard, first, to [Article 40 TEU], the Council submits that that provision aims to protect the balance of powers established by the Treaties and cannot be interpreted as aiming to protect the competences conferred upon the [Union] to the detriment of those enjoyed by the Union. In contrast to the Commission, the Council is of the view that [Article 40 TEU] does not establish a fixed boundary between [Union] and Union competences. In order to determine whether action by the Union affects [Union] competences, it is necessary to take into account the nature of the competences conferred on the [Union] in the sector concerned, in particular the complementary character of [Union] competence in the field of development cooperation.
- 44 According to the United Kingdom government, in order to regard a measure based on the EU Treaty as contrary to [Article 40 TEU], it is necessary, first, that the [Union] be competent to adopt a measure having the same purpose and the same content. Second, the measure based on the EU Treaty must encroach on a competence conferred upon the [Union] by preventing or limiting the exercise of that competence, thus creating a pre-emptive effect on [Union] competence. Such an effect is however impossible in an area such as development cooperation, where the [Union] has concurrent competences.



- 45 The Council, supported by all the intervening governments of the Member States, then contends that the campaign against the destabilising accumulation and spread of small arms and light weapons does not fall within the competences conferred on the [Union].
- 46 Neither the combating of the proliferation of small arms and light weapons, nor the more general objectives of preserving peace and strengthening security, appear among the objectives of the [Union] contained in [Article 3 TEU]. Furthermore, according to [Article 208(1) first paragraph TFEU and Article 21(2)(d) and (e) TEU], the main aim of [Union] development cooperation policy is the reduction of poverty. The objectives of preserving peace and strengthening international security fall exclusively within the EU Treaty, in particular the CFSP. The provisions of the [Treaty on the Functioning of the European Union] cannot therefore be interpreted broadly without undermining the coexistence of the Union and the [Union] as integrated but distinct legal orders and also the constitutional architecture formed by the three 'pillars' as a whole.
- 47 The Council, supported by the French, Netherlands and United Kingdom Governments, considers that the fact that the proliferation of small arms and light weapons may incidentally affect the prospects for sustainable development does not mean that the whole of that area falls within [Union] competences.
- 48 The Council and the United Kingdom Government contend, in addition, that, if the Commission's argument were accepted, the CFSP would be of no practical effect at all. That government adds that, were an incidental effect on the objectives of a [Union] competence sufficient to bring the matter under that competence, there would no longer be any limits to the scope of [Union] competences, thus undermining the principle of conferred competences. The Netherlands Government, for its part, does not consider it desirable to restrict the role of the CFSP in preserving peace and security in developing countries, since that policy enables the Council to act rapidly and decisively in those countries.
- 49 The Council, supported by the Spanish, French, Swedish and United Kingdom Governments, submits that, given the 'mixed' character of the Cotonou Agreement, a [Union] competence to combat the destabilising accumulation and spread of small arms and light weapons cannot be derived from that agreement either.
- 50 Both the Council and all the intervening governments of the Member States consider furthermore that the contested decision was adopted in accordance with the provisions and the spirit of the EU Treaty. Since the principal objective of the contested decision is to combat the accumulation and spread of small arms and light weapons, it does not fall within [Union] competence but in fact within Union competences in the framework of the CFSP.
- 51 First, the campaign against the proliferation of small arms and light weapons is part of the CFSP's fundamental objective, which is the preservation of peace and the strengthening of international security, as stated in [Articles 21(2) and 24(3) TEU]. The Swedish government adds that, with regard to the fight against the spread of small arms and light weapons in West Africa, the United Nations Security Council has adopted a number of resolutions inviting the international [Union] of donors to implement the ECOWAS moratorium on those weapons and to support its technical secretariat.
- 52 Second, the Council and the intervening governments of the Member States maintain that, in so far as a measure falls within the CFSP, [Article 40 TEU] does not preclude the Union from using the same instruments as those employed by the [Union] in the sphere of development cooperation. In order to further the objectives assigned to it in the framework of the CFSP, the instruments at the disposal of the Union are not limited to diplomatic or military démarches, but also comprise operational activities, such as the financial or technical assistance required to achieve the desired objectives.

- 53 The Council and the French Government point out moreover that the contested joint action was implemented by a series of decisions falling within the CFSP, the legality of which was not challenged by the Commission, that is: Council Decision 2002/842/CFSP of 21 October 2002 concerning the implementation of Joint Action 2002/589 with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in South East Europe (OJ 2002 L 289, p. 1); Council Decision 2003/543/CFSP of 21 July 2003 concerning the implementation of Joint Action 2002/589 with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in Latin America and the Caribbean (OJ 2003 L 185, p. 59); Council Decision 2004/790/CFSP of 22 November 2004 extending and amending Decision 2003/276/CFSP implementing Joint Action 2002/589 with a view to a European Union contribution to the destruction of ammunition for small arms and light weapons in Albania (OJ 2004 L 348, p. 45); Council Decision 2004/791/CFSP of 22 November 2004 extending and amending Decision 2002/842/CFSP implementing Joint Action 2002/589 with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in South East Europe (OJ 2004 L 348, p. 46); Council Decision 2004/792/CFSP of 22 November 2004 extending and amending Decision 1999/730/CFSP implementing Joint Action 1999/34 with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in Cambodia (OJ 2004 L 348, p. 47), and Council Decision 2005/852/CFSP of 29 November 2005 for the destruction of small arms and light weapons (SALW) and their ammunition in Ukraine (OJ 2005 L 315, p. 27).
- 54 Finally, the Council, supported in that regard by the Spanish and United Kingdom governments, argues that the Commission's plea that the contested joint action is illegal is inadmissible, since a privileged applicant, such as the Commission, is barred from pleading the illegality of an act the annulment of which it could have sought directly by an action under [Article 263 TFEU].
- 55 While referring to the arguments concerning the contested decision, the Council and the Netherlands, Swedish and United Kingdom Governments submit that, in any event, the contested joint action was adopted in full compliance with [Article 40 TEU].

#### *Findings of the Court*

##### *Application of [Article 40 TEU]*

- 56 As stated in paragraphs 31 to 33 of this judgment, under [Article 40 TEU], it is the task of the Court to ensure that the acts which, according to the Council, fall within the scope of Title V of the EU Treaty and which are capable of having legal effects do not encroach upon the powers conferred by provisions of the [Treaty on the Functioning of the European Union] on the [Union].
- 57 According to the Commission, the contested decision fails to respect the division of competences between the [Union] and the Union established by [Article 40 TEU] as it could have been adopted on the basis of competences conferred on the [Union] in the area of development cooperation. The same applies to the provisions of Title II of the contested joint action, as implemented by the contested decision, which, it claims, fall either within [Union] competences concerning development cooperation or those concerning economic, financial and technical cooperation with third countries.
- 58 It is therefore necessary to determine whether the provisions of the contested decision affect competences enjoyed by the [Union] under the [Treaty on the Functioning of the European Union], on the ground that, as the Commission argues, they could have been adopted on the basis of that treaty (see, to that effect, Case C-176/03 *Commission v Council*, paragraph 40, and Case C-440/05 *Commission v Council*, paragraph 54).

- 59 In providing that nothing in the EU Treaty is to affect the Treaties establishing the European [Union] or the subsequent Treaties and Acts modifying or supplementing them, [Article 40 TEU] aims, in accordance with the fifth indent of Article 2 EU [repealed] and [Articles 13(1) TEU and 7 TFEU], to maintain and build on the *acquis communautaire*.
- 60 Contrary to what is submitted by the United Kingdom Government, a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the [Treaty on the Functioning of the European Union] within the meaning of [Article 40 TEU] whenever it could have been adopted on the basis of the [Treaty on the Functioning of the European Union], it being unnecessary to examine whether the measure prevents or limits the exercise by the [Union] of its competences. It is apparent from the case-law of the Court that, if it is established that the provisions of a measure adopted under Titles V or VI of the EU Treaty, on account of both their aim and their content, have as their main purpose the implementation of a policy conferred by the [Treaty on the Functioning of the European Union] on the [Union], and if they could properly have been adopted on the basis of the [Treaty on the Functioning of the European Union], the Court must find that those provisions infringe [Article 40 TEU] (see, to that effect, Case C-176/03 *Commission v Council*, paragraphs 51 and 53, and Case C-440/05 *Commission v Council*, paragraphs 69 to 74).
- 61 Since the infringement of [Article 40 TEU] arises from the fact that a measure having legal effects adopted by the Union on the basis of the EU Treaty could have been adopted by the [Union], it is also not relevant whether in an area such as development cooperation – which does not fall within the exclusive competence of the [Union] and in which, therefore, the Member States are not precluded from exercising, individually or collectively, their competences (see, to that effect, Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 16, and C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 26) – such a measure could have been adopted by the Member States in exercise of their competences.
- 62 Moreover, the question whether the provisions of such a measure adopted by the Union fall within the competence of the [Union] relates to the attribution and, thus, the very existence of that competence, and not its exclusive or shared nature (see, to that effect, Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 93).
- 63 It is therefore necessary to determine whether the contested decision infringes [Article 40 TEU] inasmuch as it could have been adopted on the basis of the provisions of the [Treaty on the Functioning of the European Union].

Demarcation of the areas of [Union] development cooperation policy and the CFSP respectively

- 64 With regard to [Union] development cooperation policy, the Court has held that the objectives pursued by [Articles 208 and 21(2)(b)(d) and (e) TEU] are broad in the sense that it must be possible for the measures required for their pursuit to concern various specific matters (Case C-268/94 *Portugal v Council* [1996] ECR I-6177, paragraph 37).
- 65 [Articles 21(2)(b)(d) and (e) TEU, 208, 209(2) and 211 TFEU], which deal with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, in compliance also with commitments in the context of the United Nations and other international organisations (C-403/05 *Parliament v Commission* [2007] ECR I-0000, paragraph 56).
- 66 In addition, it follows from the Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, entitled ‘The European Consensus [on

Development]’ (OJ 2006 C 46, p. 1) that there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the [Union]’s new development policy necessarily proceed via the promotion of democracy and respect for human rights (C-403/05 *Parliament v Commission*, paragraph 57).

- 67 While the objectives of current [Union] development cooperation policy should therefore not be limited to measures directly related to the campaign against poverty, it is none the less necessary, if a measure is to fall within that policy, that it contributes to the pursuit of that policy’s economic and social development objectives (see, to that effect, Case C-268/94 *Portugal v Council*, paragraphs 44, 60, 63 and 73).
- 68 In that regard, it is apparent from a number of documents emanating from the Union institutions and from the European Council that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the proliferation of small arms and light weapons, can contribute to the elimination or reduction of obstacles to the economic and social development of those countries.
- 69 For example, on 21 May 1999, the ‘development’ Council of the European Union adopted a resolution on small arms in which it presented the proliferation of those weapons as a problem of global proportions which, in particular in crisis zones and countries where the security situation is unstable, has been an obstacle to peaceful economic and social development. More recently, in the European Union strategy to combat illicit accumulation and trafficking of small arms and light weapons adopted by the European Council on 15 and 16 December 2005 (Council document No 5319/06 PESC 31 of 13 January 2006), the European Council referred, among the consequences of the illicit spread of small arms and light weapons, in particular to those relating to the development of the countries concerned, that is, the weakening of State structures, displacement of persons, collapse of health and education services, declining economic activity, reduced government resources, the spread of pandemics, damage to the social fabric and, in the long term, the reduction or withholding of development aid, while adding that those consequences constitute, for sub-Saharan Africa, the region principally affected, a key factor in limiting development.
- 70 Equally, the Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union development policy, mentioned in paragraph 66 of the present judgment, refers, in paragraph 37, to insecurity and violent conflict as amongst the biggest obstacles to the achievement of the Millennium Development Goals, agreed by the United Nations, while mentioning, in that context, the fight against the uncontrolled proliferation of small arms and light weapons.
- 71 Nevertheless, a concrete measure aiming to combat the proliferation of small arms and light weapons may be adopted by the [Union] under its development cooperation policy only if that measure, by virtue both of its aim and its content, falls within the scope of the competences conferred by the [Treaty on the Functioning of the European Union] on the [Union] in that field.
- 72 That is not the case if such a measure, even if it contributes to the economic and social development of the developing country, has as its main purpose the implementation of the CFSP.
- 73 If examination of a measure reveals that it pursues a twofold aim or that it has a twofold component and if one of those is identifiable as the main one, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component (see, to that effect, Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 39; Case C-338/01 *Commission v Council* [2004] ECR I-4829, paragraph 55, and Case C-94/03 *Commission v Council* [2006] ECR I-1, paragraph 35; and see, with regard to the application of [Article 40 TEU], Case C-176/03 *Commission v Council*, paragraphs 51 to 53, and Case C-440/05 *Commission v Council*, paragraphs 71 to 73).

- 74 It follows that measures combating the proliferation of small arms and light weapons do not fall within the competences conferred on the [Union] in the field of development cooperation policy if, on account of their main aim or component, they are part of the pursuit of the CFSP.
- 75 With regard to a measure which simultaneously pursues a number of objectives or which has several components, without one being incidental to the other, the Court has held, where various legal bases of the [Treaty on the Functioning of the European Union] are therefore applicable, that such a measure will have to be founded, exceptionally, on the various corresponding legal bases (see, to that effect, Case C-211/03 *Commission v Council*, paragraph 40, and Case C-94/03 *Commission v Council*, paragraph 36).
- 76 However, under [Article 40 TEU], such a solution is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the [Treaty on the Functioning of the European Union] on the [Union], and within the CFSP, and where neither one of those components is incidental to the other.
- 77 Since [Article 40 TEU] precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the [Treaty on the Functioning of the European Union], the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the [Treaty on the Functioning of the European Union] on the [Union].
- 78 In the light of the foregoing it must be established whether, as the Commission claims, the contested decision, which implements the contested joint action with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, falls, by virtue both of its aim and its content, within the policy on development cooperation conferred by the [Treaty on the Functioning of the European Union] on the [Union].

#### Aim of the contested decision

- 79 With regard to the aim of the contested decision, it follows both from its title, from the legal basis relied upon and from recitals 2 to 4 in its preamble that, by making a financial and technical contribution to an ECOWAS initiative concerning the fight against the proliferation of small arms and light weapons, the decision aims to implement the contested joint action which the Council adopted on the basis of Title V of the EU Treaty.
- 80 To the extent that the contested decision implements a measure falling within the CFSP, it is necessary at the outset to examine whether, because of that fact, the decision must be understood as aiming to achieve the objectives of the CFSP rather than those of [Union] development cooperation policy.
- 81 In that regard, and without it being necessary, at this stage, to examine the Commission's plea as to the alleged illegality of the contested joint action, it should be pointed out that the joint action is presented, in its preamble, as a measure intended to replace Joint Action 1999/34, in order to include, where appropriate, ammunition for small arms and light weapons in the Union joint action.
- 82 Article 1(1) of the contested joint action sets out as objectives the combating of the destabilising accumulation and spread of small arms, the contribution to the reduction of existing accumulations of these weapons and their ammunition to levels consistent with countries' legitimate security needs and assistance in solving the problems caused by such accumulations.
- 83 Concrete expression is given to these objectives, first, in Title I of the contested joint action, which lists certain principles and measures around which the Union is aiming to build a consensus in order to combat the destabilising accumulation and spread of small arms and light weapons and,



second, in Title II of the joint action, which deals with the financial and technical assistance provided by the Union to projects which contribute to those principles and measures.

- 84 However, it cannot be inferred from the contested joint action that the implementation of the campaign against the proliferation of small arms and light weapons which it sets out will necessarily take the form of measures which pursue CFSP objectives, such as the preservation of peace and the strengthening of international security, rather than objectives of [Union] development policy.
- 85 In that regard, it should be observed, first, that Joint Action 1999/34, of which the contested joint action is the successor and whose objectives, principles listed and type of contribution envisaged are fully reproduced by it, stated clearly, in the first recital to its preamble, that the excessive and uncontrolled accumulation and spread of small arms and light weapons poses a threat to peace and security and reduces the prospects for sustainable development in many regions of the world, thereby from the outset placing the fight against that phenomenon within a dual perspective, that is preservation of peace and international security, on the one hand, and safeguarding development perspectives, on the other.
- 86 Second, it follows from the provisions of Title II of the contested joint action – which, while reproducing the provisions of Joint Action 1999/34, specify the nature of the contribution the Union will make and how its tasks will be divided between the Council and the Commission – that the objectives and the programme of action laid down by it can be implemented not only by the Union, acting within the CFSP context, but equally by the [Union], on the basis of its own competences.
- 87 Indeed, Article 7 of the contested joint action points out that it is for the Council to decide on the allocation of the financial and technical assistance referred to in Article 6 of the joint action, but explains, in Article 7(2), that the Council is to decide ‘without prejudice to ... operation of the [Union]’, on a case-by-case basis, on the principle, arrangements and financing of the projects implementing the joint action. The fact that the contested joint action can be implemented both by the [Union] and the Union is confirmed in Article 8 thereof, in which the Council notes that the Commission intends to direct its action towards achieving the objectives and the priorities of the joint action, where appropriate by pertinent [Union] measures, and in Article 9 of the joint action, which places in the hands of the Council and the Commission the responsibility for ensuring the consistency of the Union’s activities in the field of small arms, ‘in particular with regard to its development policies’, and for ensuring implementation of their respective action, each in accordance with its powers. The need for consistency of the Union’s activities in the field of small arms and light weapons is also stated, with an identical reference to ‘development policies [of the Union]’ in Article 4(2) of the contested decision.
- 88 The conclusion that the objectives of the contested joint action can be implemented both by the Union, under Title V of the EU Treaty, and by the [Union], under its development cooperation policy, corresponds, in the end, to the approach advocated by the Union’s institutions and by the European Council in numerous documents.
- 89 First, the Council itself, in the resolution on small arms referred to in paragraph 69 of this judgment, while alluding to the action undertaken by the Union in the CFSP framework and recalling the need to ensure coherence of Union activities in the field of small arms, inter alia in relation to the CFSP, nevertheless recommends, in the same document, that, in the field of development cooperation, the [Union] and the Member States devote particular attention to the following measures: ‘inclusion of the small arms issue in the political dialogue with ACP and other development cooperation partner countries of the Union; development cooperation support for countries seeking assistance in the control or elimination of surplus small arms ...; considering support, where necessary, to strengthen appropriate government institutions and legislation to better control small arms’, while adding, concerning the last point, that ‘[t]he first interventions could be focused on Southern ... and on West Africa (ECOWAS), where significant progress has



been made and frameworks for combating small arms proliferation have been developed and agreed’.

- 90 Second, in the European Union strategy to combat illicit accumulation and trafficking of small arms and light weapons, referred to in paragraph 69 of this judgment, the European Council mentions, among the means at the disposal of the Union, the [Union] and the Member States to react to the threat of the illicit spread of those weapons, in particular, apart from civilian and military instruments for managing crises and other diplomatic tools, partnership and cooperation agreements with third countries and development and assistance programmes which fall within EC-ACP cooperation and include a chapter on small arms and light weapons and their ammunition. Having indicated, in paragraph 15, that, according to the European Council, the challenge for a Union strategy on small arms and light weapons is to respond to that threat and to ensure that its security policy and its development policy are consistent, the document mentions, as the final element of the action plan introduced in order to respond to the accumulation of such weapons, the need to ‘[e]nsure consistency and complementarity between Council decisions in the CFSP framework and actions implemented by the Commission in the field of development aid in order to promote a consistent approach for all [Union] activities in the ... area [of small arms and light weapons]’.
- 91 Third, paragraph 37 of the joint statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, referred to in paragraph 66 of this judgment, announces concrete steps to limit the uncontrolled proliferation of small arms and light weapons which will be taken, in line with the European strategy against the accumulation and the illicit traffic of such weapons and their ammunition, by ‘[t]he EU, within the respective competences of the [Union] and the Member States’.
- 92 Therefore, since the measure falling within the CFSP which the contested decision is intended to implement does not exclude the possibility that its objectives can be achieved by measures adopted by the [Union] on the basis of its competences in the field of development cooperation, it is necessary to examine whether the contested decision, as such, must be regarded as a measure which pursues objectives falling within [Union] development cooperation policy.
- 93 In that regard, recital 1 in the preamble to the contested decision states that the excessive and uncontrolled accumulation and spread of small arms and light weapons not only poses a threat to peace and security, but also reduces the prospects for sustainable development, particularly in West Africa.
- 94 According to recital 2 in its preamble, the contested decision is intended to implement the contested joint action by which the Union envisages, in particular by promoting confidence-building measures, the pursuit of the objectives set out in Article 1 of that joint action, that is, the combating of the destabilising accumulation and spread of small arms and light weapons and the reduction of existing accumulations of these weapons.
- 95 Contrary to what is submitted by the Commission and the Parliament, it cannot be denied that the contested decision, to the extent that it aims to prevent further accumulation of small arms and light weapons in West Africa capable of destabilising that region, forms part of a general perspective of preserving peace and strengthening international security.
- 96 None the less, it cannot be inferred from the contested decision that in comparison with its objectives of preserving peace and strengthening international security its concern to eliminate or reduce obstacles to the development of the countries concerned is purely incidental.

97 As confirmed by recitals 3 and 4 in the preamble of the decision, the financial and technical contribution which the Union intends to make is designed to help consolidate the initiative taken in the field of small arms and light weapons by ECOWAS.

98 The contested decision therefore has the specific goal of strengthening the capacities of a group of African developing countries to combat a phenomenon which, according to recital 1 in the preamble to the decision, constitutes an obstacle to the sustainable development of those countries.

99 It follows that the contested decision pursues a number of objectives, falling within the CFSP and development cooperation policy respectively, without one of those objectives being incidental to the other.

#### Content of the contested decision

100 The conclusion drawn in the preceding paragraphs from the examination of the objective of the contested decision is not invalidated by the analysis of its content.

101 Article 1(2) of the contested decision provides for a financial contribution and technical assistance to set up a Light Weapons Unit within the ECOWAS Technical Secretariat and to convert into a convention the existing moratorium between the member states of that organisation concerning small arms and light weapons. To that end, Article 4(1) of the contested decision provides for a reference amount of EUR 515 000.

102 Under Article 3 of the contested decision, the financial implementation of that decision is entrusted to the Commission and, following conclusion by it of a financing agreement with ECOWAS, is to take the form of a grant which, amongst other things, is to cover, over a period of one year, the salaries, travel expenses, supplies and equipment necessary for setting up the Light Weapons Unit within the ECOWAS Technical Secretariat and for converting the abovementioned moratorium into a convention.

103 With regard to the technical assistance which must be afforded by the Union, the project which is detailed in the annex to the contested decision indicates that it involves the putting in place of experts responsible for carrying out the studies necessary to draw up a draft convention.

104 As pointed out by the Advocate General in point 211 of his Opinion, it is only in the light of the aims that they pursue that a financial contribution or technical assistance can be regarded as falling within the scope of the CFSP or of [Union] development cooperation policy.

105 While there may be some measures, such as the grant of political support for a moratorium or even the collection and destruction of weapons, which fall rather within action to preserve peace and strengthen international security or to promote international cooperation, being CFSP objectives stated in Article 11(1) EU [Article 21(2) TEU], the decision to make funds available and to give technical assistance to a group of developing countries in order to draft a convention is capable of falling both under development cooperation policy and the CFSP.

106 The fact that the contested joint action was implemented by other decisions adopted under Title V of the EU Treaty, the legality of which the Commission has not challenged, cannot determine the outcome of the present case. For, according to settled case-law, the legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other Union measures which might, in certain cases, display similar characteristics (see, to that effect, Case C-94/03 *Commission v Council*, paragraph 50).

107 Moreover, as pointed out in paragraph 87 of this judgment, the contested joint action which the contested decision aims to implement does not itself exclude the possibility that the objective of the campaign against the proliferation of small arms and light weapons can be achieved by [Union]

measures, when it refers, in Articles 8 and 9, to the Commission's intention to direct its action towards achieving that objective, where appropriate by pertinent [Union] measures, and to the obligation of the Council and the Commission to ensure the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies, and to ensure implementation of their respective action, each in accordance with its powers.

108 It follows from the foregoing that, taking account of its aim and its content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within [Union] development cooperation policy and the other within the CFSP.

109 Having regard to the reasoning contained in paragraphs 76 and 77 of this judgment, it must be concluded that the Council has infringed [Article 40 TEU] by adopting the contested decision on the basis of Title V of the EU Treaty, since that decision also falls within development cooperation policy.

110 The contested decision must therefore be annulled.

111 As the decision must be annulled because of its own defects, it is not necessary to examine the plea as to the alleged illegality of the contested joint action.

#### **Costs**

112 Under Article 69(2) 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. As the Commission has not asked that the Council be ordered to pay the costs, it follows that those two institutions must bear their own costs. Under Article 69(4) of the Rules of Procedure, the interveners in these proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Annuls Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECO WAS in the framework of the Moratorium on Small Arms and Light Weapons;**
- 2. Orders the Commission of the European [Union] and the Council of the European Union to bear their own costs;**
- 3. Orders the Kingdom of Denmark, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.**