OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 19 September 2007 [1]

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I — Introduction

1. By its application, the Commission of the European Communities 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 [2] ('the contested decision') and to declare inapplicable, because of its illegality, Title II of 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 [3] ('the contested Joint Action').

2 — OJ 2004 L 359, p. 65.
3 — OJ 2002 L 191, p. 1.

2. The main point of the present case concerns, in substance, the interpretation of Article 47 EU and the distribution of competences between the European Union, acting in the framework of Title V of the EU Treaty, 'Provisions on a common foreign and security policy' (CFSP), and the European Community in the area of development cooperation (Title XX of the EC Treaty). From the procedural viewpoint, the case also raises the problem of the admissibility of a plea of illegality raised by a so-called 'privileged' applicant against an act of a general nature in the original context of the relationship between the first and second pillars of the European Union.

II — Legal context and background to the dispute

A — *The Cotonou Agreement*

3. The partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part [4] ('the Cotonou Agreement') was signed in Cotonou (Benin) on 23 June 2000 and was approved on behalf of the Community by Council Decision 2003/159/EC of 19 December 2002. [5] It came into force on 1 April 2003.

4. Article 1 of the Cotonou Agreement, entitled 'Objectives of the partnership', states:

'The Community 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

4 — OJ 2000 L 317, p. 3.

5 — OJ 2003 L 65, p. 27.

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.

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.

5. 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.

…'.

6. Pursuant to Articles 6 to 10 of Annex IV to the Cotonou Agreement, 'Implementation and Management Procedures', a regional cooperation strategy and a regional indicative programme were laid out 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) [6] and the West African Economic and Monetary Union (WAEMU), of the other.

7. This document highlights, in section 2.3.1, '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'. In section 6.4.1, 'Support for a regional policy of conflict prevention and good governance', this document states that support 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.

8. 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 will be allocated to the ECOWAS Small Arms Control Programme.

B — *The contested Joint Action*

9. On 12 July 2002, the Council of the European Union adopted the contested Joint Action, which repealed and replaced Council Joint Action 1999/34/CFSP of 17 December 1998 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons. [7] As regards its material scope, the contested Joint Action includes, where appropriate, ammunition for small arms and light weapons, while maintaining, in the annex, the list of weapons in the annex to Joint Action 1999/34/CFSP [8] and respecting, in the body of the Joint Action, the previous

6 — This regional organisation, established in 1975, aims to promote cooperation between and the integration of the West African States and at present consists of 15 Member States, namely the Republic of Benin, Burkina-Faso, the Republic of Cabo Verde, the Republic of Côte d'Ivoire, the Republic of Gambia, the Republic of Ghana, the Republic of Guinée, the Republic of Guinée-Bissau, the Republic of Liberia, the Republic of Mali, the Republic of Niger, the Federal Republic of Nigeria, the Republic of Senegal, the Republic of Sierra Leone and the Togolese Republic. The Islamic Republic of Mauritania left the organisation in 2002. See http://www.ecowas.int/

7 — OJ 1999 L 9, p. 1.

8 — The annex to the contested Joint Action lists the small arms and light weapons covered by that measure, without prejudging any future internationally agreed definition of small arms and light weapons. Small arms are 'small arms and accessories specially designed for military use', namely machine guns, sub-machine guns, fully automatic and semi-automatic rifles and moderators, and light weapons are 'man or crew-portable light weapons', namely cannon, howitzers and mortars, grenade launchers, anti-tank weapons, anti-tank missiles and launchers and anti-aircraft missiles.

convention of using the term 'small arms' to refer to 'small arms and light weapons'.

10. In the words of Article 1(1) of the contested Joint Action, its objectives are the following:

'— 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.'

11. Title I of the contested Joint Action, 'Principles on preventive and reactive aspects', sets out the principles and objectives on which the European Union will aim to build consensus in the relevant regional and international forums. To this end, the Title sets out the principles and measures that have to be realised to prevent the further destabilising accumulation of small arms (Article 3) and to reduce existing accumulations of small arms and their ammunition (Article 4).

12. Among the principles and measures that have to be realised to prevent the further destabilising accumulation of small arms, Article 3 in Title I mentions 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.

13. Among the principles and measures that have to be realised to reduce existing accumulations of small arms and their ammunition, Article 4 in Title I cites in particular the provision of assistance as appropriate to countries requesting support for controlling or eliminating surplus small arms and ammunition 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.

14. 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 and identifiable contribution to the principles and measures referred to in Title I.

15. Article 6(2) in Title II states that, in providing such assistance, the Union is to take into account in particular: the recipients' commitments to comply with the principles mentioned in Article 3 of the contested Joint Action; 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.

16. Article 8 in Title II states:

'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 Community measures.'

17. Article 9(1) in Title II states:

'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.'

C — 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 European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons. [9] As legal basis, the contested decision cites the contested Joint Action, in particular Article 3 thereof, and Article 23(2) EU.

9 — This Moratorium was solemnly declared by the Heads of State and Government of the Member States of ECOWAS at the Abuja summit on 30 and 31 October 1998 for a term of three years, which was renewed for a further three years in 2001. The text of the 'Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa' is available at the following internet address: http://www.grip.org/bdg/g1649.html.

19. In its preamble, the contested decision sets out 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].'

20. In the words of Article 1 of the contested decision, the European 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 this end, the Union is to offer a financial contribution and technical assistance 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 states:

'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…'

22. Article 4(2) of the contested decision states:

'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 contested decision was adopted, the Commission made the following declaration:

'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 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 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 Community development policy and the Cotonou Agreement are based. Such areas of shared competences are just as much protected by Article 47 [EU] as the areas of exclusive Community competence; otherwise Article 47 would be deprived of a large part of its useful effect. The Commission reserves its rights in this matter.' [10]

III — Forms of order sought and procedure before the Court

24. The Commission claims that the Court should:

— annul the contested decision,

10 — Doc. No 15236/04 CFSP 1039, 25 November 2004.

— declare illegal and hence inapplicable the contested Joint Action, in particular Title II thereof.

25. The Council contends that the Court should:

— dismiss the claim for annulment of the contested decision as unfounded,

— dismiss the Commission's claim for a declaration of inapplicability of the contested Joint Action as inadmissible and, in the alternative, as unfounded,

— order the Commission to pay the costs.

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

27. By order of the same day, the President of the Court granted 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 leave to intervene in support of the form of order sought by the Council. By order of 12 September 2005, the President of the Court also granted the Kingdom of Denmark leave to intervene in support of the form of order sought by the Council.

28. The Commission and the Council, and also the parties which were given leave to intervene in the present case, made submissions at the hearing which took place on 5 December 2006, with the exception of the Kingdom of the Netherlands, which was not represented.

IV — Analysis

A — *Admissibility*

1. Admissibility of the application for annulment of the contested decision

29. There is no doubt — and the Council and the parties which have intervened in support of the forms of order it seeks have not argued to the contrary — that the application for annulment of the contested decision is

admissible in that it seeks a finding that the act adopted by the Council in the framework of Title V of the EU Treaty ('Provisions on a [CFSP]') encroaches on the powers of the European Community in the area of development cooperation.

2. Admissibility of the plea of illegality of the contested Joint Action

(a) Arguments of the parties

30. Although the contested decision, based on Article 23 EU and on the contested Joint Action adopted pursuant to Title V of the EU Treaty, is not, in principle, subject to judicial review under Article 230 EC it must observed that, in accordance with Article 46(f) EU, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers are applicable to Article 47 EU, which provides that *nothing in the EU Treaty shall affect the EC Treaty*.

31. Following the example of what has been inferred from Articles 46(f) and 47 EU with regard to the judicial review of acts of the Council adopted on the basis of the present Title VI of the EU Treaty (the third pillar), 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 EU Treaty do not encroach on the powers conferred by the EC Treaty on the Community. [11]

11 — See Case C-170/96 *Commission* v *Council* [1998] ECR I-2763, paragraph 16, and Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 39.

32. According to the Council, supported by the Spanish and United Kingdom governments, the Commission's plea that the contested Joint Action is illegal is inadmissible in so far as, first, the Court has no jurisdiction to rule on the legality of a measure under the CFSP and, second, 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 230 EC.

33. In its reply and its written observations on the statements in intervention of the Spanish and the United Kingdom governments, the Commission rebuts the objections to the admissibility of the plea of illegality by observing, first, that the plea is raised only in the light of Article 47 EU, that is to say, for the same reasons as those on which its principal application for the annulment of the contested decision is based, and, second, that privileged applicants have the right to plead the illegality of a legislative act where such illegality is revealed fully when the act is actu-

ally applied, after the expiry of the period laid down by the fifth paragraph of Article 230 EC for bringing an action for the annulment of that act.

(b) Analysis

34. I wish to point out straightaway that examination of the admissibility of the plea of illegality of the contested Joint Action seemed to me necessary at this stage of my remarks in so far as, on the substance of the case, the assessment of the legality of the contested decision cannot, in my view, be dissociated from the assessment of the provisions of the contested Joint Action.

35. The objection of inadmissibility raised by the Council and the Spanish and United Kingdom governments raises in essence difficulties of two kinds. First, the question whether, in the context of the EC Treaty, it is open to a so-called 'privileged' applicant to plead the illegality of an act which the applicant could certainly have challenged directly in accordance with Article 230 EC. Second, if the reply to that question is at least partly in the affirmative, it is necessary to determine whether that solution can be extended to a situation such as that in the present case where the allegedly illegal act was adopted on the basis of Title V of the EU Treaty. These two questions will be examined in turn.

(i) Admissibility of a plea of illegality raised by a privileged applicant against a regulation pursuant to Article 241 EC

36. It must be observed that, under Article 241 EC, *notwithstanding* the expiry of the period laid down in the fifth paragraph of Article 230 EC, *any party* may, in proceedings in which a *regulation* adopted jointly by the Parliament and the Council, or a regulation of the Council, of the Commission or of the European Central Bank is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation. [12]

37. As to the nature of the act at issue, the case-law accepts that a plea of illegality cannot be limited to acts which take the form of a regulation within the meaning of Article 241 EC and, preferring a broader interpretation of Article 241, looks rather to the content of the allegedly illegal act which must have a 'general character.' [13]

12 — Italics added.

13 — Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 40 and 41. See also Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 56, and Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez and Others* v *Parliament* [2001] ECR II-2823, paragraph 134.

38. This clarification means, as a first consequence, that any applicant, including therefore a privileged applicant, is barred from pleading the illegality of decisions formally addressed to that applicant which it has failed to challenge directly within the period laid down by the fifth paragraph of Article 230 EC, [14] save in a situation — which is in any case irrelevant in the present case — where the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent. [15]

39. With regard to the scope ratione personae of Article 241 EC, although it states that *notwithstanding* the expiry of the period laid down in Article 230 *any party* may, as a collateral challenge, invoke the inapplicability of a regulation (understood as an act of a 'general nature'), the problem of the admissibility of a plea of illegality, raised pursuant to Article 241 EC by a privileged applicant such as a Community institution or a Member State, has however arisen on several occasions in recent decades.

40. The recurrence of this question seems to have been partly occasioned by the Court's repeated refusal to give a ruling on the admissibility of pleas of illegality raised by privileged applicants against Community regulations either in the context of an application for the annulment of a decision based on the regulation in question or as a means of defence against an allegation of failure to comply with a regulation, [16] in spite of the proposals of several advocates general who, mainly with reference to the wording of Article 241, delivered opinions suggesting that those collateral challenges are admissible. [17]

41. It should be noted that, although in some of those cases the Court examined in substance the alleged illegality of the regu-

14 — See, with regard to privileged applicants, Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, paragraph 21; Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 14; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 10; and Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraphs 16 and 17. In relation to State aid, the Community courts have found that a recipient of State aid was barred from pleading the illegality of a Commission decision finding that the individual aid in question was incompatible, although the decision was not formally addressed to that recipient, but it could undoubtedly have brought an action for the annulment of the decision: see. in relation to the plea before the national court (a situation in which Article 241 EC is not applicable), Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 17 and 18, and, before the Community court, Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265, paragraph 103.

15 — Case 226/87 *Commission* v *Greece*, cited above, paragraph 16 and case-law cited.

16 — Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389; Case 116/82 *Commission* v *Germany* [1986] ECR 2519; Case 181/85 *France* v *Commission* [1987] ECR 689, paragraph 31; Case 204/86 *Greece* v *Council* [1988] ECR 5323; Case C-258/89 *Commission* v *Spain* [1991] ECR I-3977; and Case C-331/00 *Greece* v *Commission* [2003] ECR I-9085. In the last-mentioned case, however, the plea of illegality was not raised clearly by Greece (see point 114 of the Opinion of Advocate General Tizzano).

17 — See the Opinion of Advocate General Roemer delivered in *Italy* v *Council and Commission*, 411; the Opinion of Advocate General Slynn in *France* v *Commission,* 703; point 6 of the Opinion of Advocate General Mancini in *Greece* v *Council*; and points 23 to 32 of the Opinion of Advocate General Darmon in *Commission* v *Spain*.

lations at issue,[18] having received opinions in favour of the admissibility of the pleas of illegality,[19] the refusal to give an express ruling on admissibility has continued to give rise to certain questions, which may be supposed to have been the origin of the hesitation expressed by Advocate General Jacobs in his Opinion delivered on 3 October 2002 in *Commission* v *ECB*[20] — to which I shall revert later — with regard to expressing 'a final view' on the question.[21]

42. The controversy also appears to have been started by an a contrario interpretation of the reasoning of certain judgments in which the Community court stated that Article 241 EC gives expression to the general principle conferring upon any party to proceedings the right to make a collateral challenge to the validity of regulations or of Community acts 'of a general nature' *if* that party was not entitled under Article 230 EC to bring a direct action challenging those acts.[22]

43. Consequently, this reasoning appeared to tie the right to institute a collateral review of a regulation to the unavailability of the possibility of bringing an action for its annulment.

44. In addition, it is relevant to note that the Council as well as the Spanish Government largely base on that line of reasoning their objection of inadmissibility in relation to the Commission's plea that the contested Joint Action is illegal.

45. Furthermore, the controversy was certainly not settled by the *Nachi Europe* judgment in the complex matter of the imposition of anti-dumping duties, in which the Court found that an undertaking which undoubtedly had a right to bring an action before the Community court for the annul-

18 — That was the case in *Commission* v *Germany* (paragraph 8), *France* v *Commission* (paragraphs 4, 5 and 31), *Greece* v *Council* (paragraph 11) and *Greece* v *Commission* (paragraph 97). It should be noted that in *Italy* v *Council and Commission* the Court dismissed the plea of illegality as inadmissible on the ground that there was no connection between the allegedly illegal regulation and the contested measure; in *Commission* v *Spain* the Court avoided the procedural difficulty by finding (in paragraph 6) that the defence raised by the Spanish Government did not relate to the regulation in question as such, but to the interpretation of it set out by the Commission in its action for failure to fulfil obligations.

19 — However, it must be observed that in *Commission* v *Germany* no specific attention was paid to this procedural problem, whereas in *Greece* v *Commission*, Advocate General Tizzano proposed, at point 114 of his Opinion, that the plea of illegality be dismissed as inadmissible primarily on the ground that the Greek Government had not challenged the regulation at issue within the time-limit laid down in Article 230 EC.

20 — Case C-11/00 *Commission* v *ECB* [2003] ECR I-7147.

21 — Points 100 and 190 of the Opinion in *Commission* v *ECB*.

22 — See *Simmenthal* (paragraph 39). See also *Martinez and Others* v *Parliament* (paragraph 133) and Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* v *Commission* [2003] ECR II-1635, paragraph 76 (italics added).

ment of a Community regulation fixing anti-dumping duties could not, on grounds of legal certainty, [23] collaterally call into question the validity of that regulation in a dispute before a national court.

46. Although the reasoning of that judgment is also based on the hybrid nature of regulations of that kind, being acts of a legislative nature and, at the same time, acts liable to be of direct and individual concern to certain traders, [24] the reference to the wording in *Simmenthal*, [25] cited in point 42 above, and its extension to the case of a Community regulation, without the Court's reasoning appearing to be limited to the special nature of anti-dumping regulations, could also contribute to continued doubts as to the outcome of a plea of illegality raised by privileged applicants before the Court in the context of the formal application of Article 241 EC.

47. However, the Court provided significant clarification in *Commission* v *ECB*, which suggests that it is open to a privileged applicant to invoke before the Court, by means of a plea of illegality, the inapplicability of a regulation of a general or legislative nature.

48. In that case, the Commission sought the annulment of a decision of the European Central Bank (ECB) concerning the prevention of fraud, on the ground that the decision infringed Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF). [26] One of the defences raised by the ECB to the application for annulment was that Regulation No 1073/1999 was unlawful and should be declared inapplicable pursuant to Article 241 EC on the ground that it was adopted in breach of several provisions of the Treaty, in particular Article 105(4) EC, relating to consultation of the ECB. The Commission took the view that such a defence was inadmissible because the ECB was barred from pleading the unlawfulness of an act against which it could have brought an action for annulment under Article 230 EC.

49. After observing, first, that the addressee of an individual decision is barred from pleading its illegality and, second, that, in accordance with *Nachi Europe*, a Community

23 — Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraphs 37 and 38.

24 — End of paragraph 37 of the judgment.

25 — Cited above (paragraph 39).

26 — OJ 1999 L 136, p. 1.

regulation may become definitive as against an individual in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230 EC, [27] the Court stated that those 'principles … nevertheless do not *in any way* affect the rule laid down by Article 241 EC, *which provides* that any party may, in proceedings in which a regulation of the kind referred to in Article 241 EC is at issue, plead the grounds specified in the second paragraph of Article 230 EC in order to invoke before the Court of Justice the inapplicability of that regulation'. [28] Since the 'legislative nature' of Regulation No 1073/1999 was not challenged and it was not claimed that the regulation should be treated as a decision or that the ECB would, in such a case, be the addressee thereof, [29] the Court dismissed the Commission's objection of inadmissibility and examined in substance the ECB's plea of illegality.

50. In relying only on a literal reading of Article 241 EC to recognise that any party has the right to invoke, as a collateral challenge, the inapplicability of a regulation of a 'legislative nature', the Court, this time expressly, endorsed the position of several of its Advocates General, as previously described.

51. If indeed there is still any doubt, after reading the judgment in *Commission* v *ECB*, as to the extension to all privileged applicants of its conclusion with regard to the admissibility of the plea of illegality raised by the ECB, in view of the fact that, under the third paragraph of Article 230 EC, the ECB has capacity to bring actions only for the purpose of protecting its prerogatives, a literal and logical argument following on from the reasoning in that judgment supports that extension.

52. It must be remembered that Article 241 EC grants any party the right to invoke the inapplicability of a regulation in a dispute in which it is at issue '*notwithstanding* the expiry of the period laid down in the fifth paragraph of Article 230 [EC]'. [30]

53. The argument that the possibility of pleading the unlawfulness of a regulation should be reserved to parties who have been unable to bring an action for annulment is not very convincing if, according to the wording of Article 241 EC, that plea may be invoked 'notwithstanding' the expiry of the period for bringing an action for annulment. [31]

27 — See paragraphs 74 and 75 of the judgment.
28 — Paragraph 76 of the judgment (italics added).
29 — Paragraph 77 of the judgment.
30 — Italics added.
31 — See, to that effect, the Opinion of Advocate General Darmon (paragraph 25).

54. Article 241 EC therefore undoubtedly gives privileged applicants the right to invoke, as a collateral challenge, the illegality of a regulation 'of a legislative nature' even when they could have challenged it directly within the period laid down in the fifth paragraph of Article 230 EC.

55. Consequently, it is necessary to determine whether that conclusion can be extended to a situation where the plea of illegality is raised by the Commission against a joint action adopted on the basis of Title V of the EU Treaty.

(ii) Admissibility of a plea of illegality raised against a joint action adopted on the basis of Title V of the EU Treaty.

56. First of all, I consider that the first limb of the Council's objection of inadmissibility, which is worded in a general way and claims that the Court has no jurisdiction to adjudicate on the plea that the contested Joint Action is illegal, must be dismissed for reasons similar to those set out in point 31 above.

57. As the provisions of the EC Treaty relating to the Court's jurisdiction and its exercise, of which Article 241 certainly forms part, apply to Article 47 EU, the Court may be required to ascertain whether a joint action of the Council adopted by virtue of Article V of the EU Treaty, which forms the basis of the decision which is the subject of the action, is inapplicable in so far as the Council, by adopting the joint action, encroached on the competences conferred on the Community by the EC Treaty.

58. As is clear from the preceding paragraph, Article 47 EU naturally imposes limits on the Court's jurisdiction to adjudicate on a plea of illegality of an act adopted on the basis of Title V of the EU Treaty, like the limits it imposes on the application of Article 230 EC to those same acts. Accordingly, the arguments in support of the plea of illegality, like those in support of the main application for annulment, must, in my view, be limited to disputing the Council's power to adopt the allegedly unlawful act on the ground that it encroached on the competences conferred on the Community by the EC Treaty.

59. On that point it must be observed that, without denying the general scope of the plea of illegality raised in its submissions as covering all the provisions of the contested Joint Action, the Commission none the less made it clear in its pleadings that Title I of the contested Joint Action (that is to say,

Articles 2 to 5), was within the scope of the CFSP, apart from certain elements of Article 4.[32].

60. This position should lead to a finding that the Court has no jurisdiction to assess the plea of illegality in so far as it concerns the abovementioned articles. Such a finding would not mean, however, that the Court cannot take those articles into account when examining the legality of the contested decision, having regard to the fact that the only citation in the preamble to the latter refers to Article 3 of the contested Joint Action.

61. Second, it seems to me that the admissibility of the plea of illegality at issue in the present case depends less on the Commission's status as a privileged applicant than on the nature of the allegedly unlawful act.

62. If the contested Joint Action is of a legislative or general nature within the meaning of the Court's case-law and therefore resembles a regulation for the purpose of Article 241 EC, the Commission, like any party, may use the method laid down by that provision to mount a collateral challenge to the Council's power to adopt that act. On the other hand, if the contested Joint Action were to be reclassified as a decision addressed to the Commission, the Commission would be barred from pleading its illegality.

63. In that connection it must be observed that, under Article 14(1) EU, joint actions address situations where operational action by the Union is deemed to be required, and they lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation. In addition, under Article 14(3), joint actions commit the Member States in the positions they adopt and in the conduct of their activity.

64. In the present case, it will be recalled that Article 1 of the contested Joint Action describes the objectives relating to combating the accumulation and spread of small arms and light weapons, while Titles I and II of the contested Joint Action respectively set out the principles of preventive and reactive aspects and the contribution of the European Union to the realisation of those principles. According to the provisions of Title II of the contested Joint Action, the Council must in particular decide on the principles, arrangements and financing which make a direct and identifiable contribution to the principles set out in Title I of the contested Joint Action. Furthermore, under Article 8 of the contested Joint Action, the Council notes that the Commission intends to direct its

32 — See, in particular, points 52 to 54 of the application.

action towards achieving the objectives and the priorities of the contested Joint Action. Finally, Article 12 of the contested Joint Action provides that it is to enter into force on the date of its adoption, without specifying the addressees.

65. In view of those characteristics, and even though the contested Joint Action undeniably, at least with regard to Title II, has an operational aspect inherent in the very nature of such an act, it has in no way, including in relation to Title II, the character of a decision vis-à-vis the Commission such as to make the Commission its addressee.

66. Furthermore, it has not been alleged, in support of the objection of inadmissibility to the plea of illegality, that the contested Joint Action had the character of an individual decision vis-à-vis the Commission, and neither the Council nor the Spanish or the United Kingdom governments have disputed the general nature of the contested Joint Action rightly asserted by the Commission.

67. In those circumstances, I consider that the Commission's plea of illegality against the contested Joint Action is admissible, at least so far as Title II thereof is concerned.

68. This conclusion is not called into question by the Council's argument that the Commission's submissions show that the alleged unlawfulness of the contested Joint Action was apparent when it was adopted, so that the Commission is barred from pleading that it is unlawful.

69. Just as a circumstance of that kind is irrelevant in relation to a plea of illegality against a regulation for the purpose of Article 241 EC, it cannot be taken into account as a condition for the admissibility of a plea of illegality against an act of a general nature such as the contested Joint Action adopted on the basis of Title V of the EU Treaty.

70. In addition, to dismiss that circumstance as irrelevant does not amount to permitting the Commission to circumvent the mandatory time-limit laid down in the fifth paragraph of Article 230 EC for bringing an action for annulment, The claim lodged by the Commission constitutes only a declaration that the contested joint action is not

applicable in the present case, in accordance with Article 241 EC, and would not mean the annulment of that act or of some of its provisions if the claim succeeded.

71. Therefore, in my view, the objection of inadmissibility raised by the Council and the Spanish and United Kingdom governments should be dismissed and the Commission's plea that the contested Joint Action, or at least Title II thereof, is illegal should be found admissible.

72. Consequently, the Commission's application for the annulment of the contested decision and its claim that the contested Joint Action, or at least Title II thereof, be declared inapplicable are admissible.

B — *Substance*

73. As they stress in their respective pleadings, the principal parties and interveners disagree, first, on the interpretation and scope of Article 47 EU and, second, on the relationship between combating the proliferation of small arms and light weapons and Community competences. Third, their submissions on the two preceding questions lead to diametrically opposed conclusions as to the legality of the contested decision and of the contested Joint Action.

74. In the following remarks I shall therefore proceed to examine those three points.

1. Interpretation and scope of Article 47 EU

(a) Arguments of the parties

75. The Commission, supported by the Parliament, considers that the contested decision relating to combating the proliferation of small arms and light weapons must be annulled because it encroaches upon the competences conferred on the Community in the area of development cooperation, thus failing to observe Article 47 EU.

76. According to the Commission and the Parliament, Article 47 EU aims to protect the Community's competences as against the activity of the European Union based on the EU Treaty by establishing a 'fixed' boundary between the competences of the Community and those of the European Union.

77. Under Article 47 EU, the relationship between Community competence and the competence of the European Union acting in the framework of the CFSP is not like that between Community competences and the competences of the Member States in the sense that, to delimit the competences of the Community and of the European Union, recourse cannot be had to the principle of pre-emption. 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 Community has not yet exercised its competence, the same cannot be said for the Union which, under Article 47 EU, must respect the competences of the Community, whether exclusive or not, even if they have not been exercised.

78. The Council claims that the controversy on the distribution of competences between the Community and the European Union is no doubt relevant, but in the present case the Community has no competence (potential or actual) to combat the proliferation of small arms and light weapons.

79. On the interpretation of Article 47 EU, the Council submits that that provision aims to maintain the balance of powers established by the Treaties and cannot be interpreted as aiming to protect the competences conferred upon the Community to the detriment of those conferred upon the European Union. Under Article 5 EC, the Community can act only within the limits of the competences conferred upon it by the EC Treaty and of the objectives assigned to it therein.

80. The Council adds that Article 47 EU does not prevent the adoption of measures in the framework of the CFSP which use the same instruments as those used by the Community in the framework of development cooperation, where those measures do not aim to achieve the objectives of development cooperation but those arising from the CFSP.

81. The United Kingdom Government considers for its part that two conditions must be satisfied for an act based on the EU Treaty to be regarded as contrary to Article 47 EU.

82. First, the Community must be competent to adopt a measure having the same purpose and the same content. Even if the

act adopted on the basis of the EU Treaty relates to a matter in which the Community could have acted by virtue of the objectives assigned to it, there is thus no infringement of Article 47 EU where that act pursues a totally different objective, in particular an objective falling specifically within the CFSP.

83. Second, the measure based on the EU Treaty must encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence. This pre-emptive effect is impossible in an area such as development cooperation, where the Community has concurrent competences. In a sphere where there are concurrent competences, the mere fact that the Community has exercised its competence does not prevent the European Union from exercising its competence. The only constraint which there would then be on the European Union is the obligation of consistency laid down in Article 3 EU.

(b) Analysis

84. The bitter dispute between, in particular, the Commission and the United Kingdom Government concerning the interpretation of Article 47 EU appears to be only the visible part of a more fundamental difference regarding the structure of the European Union.

85. According to the model upheld by the Commission, the relationship between the European Union and the Community is not comparable with that between the Community and the Member States. In that model, which could be called 'triangular', the Union possesses and exercises its own competences which are not merely equivalent to the collective exercise of the competences retained by the Member States. Accordingly, the Commission upholds the idea of a 'fixed' boundary between the Community and the European Union acting in the framework of the CFSP.

86. In contrast, the United Kingdom Government upholds a model which could be described as 'dualist' by treating the boundary between the competences of the Community and those of the European Union as the same as the boundary separating the Community and its Member States. In other words, according to that approach, an action of the European Union under Title V of the EU Treaty pursuing one of the objectives laid down in Article 11(1) EU, including the preservation of peace and the strengthening of international security, would *never* encroach on the competences of the Community in the area of development cooperation, even if that action had a similar content to the action of the Community, because, like its Member States, the Union

would be exercising concurrent competences with those of the Community, thus rendering recourse to Article 47 EU pointless. [33]

87. On the face of it this may appear an academic question in so far as neither the Commission nor the United Kingdom Government denies that the examination which the Court should carry out in order to determine whether Article 47 EU has been infringed must rest on an assessment of the objective and the content of the contested decision in the light of the contested Joint Action. However, it is also clear from the pleadings of the United Kingdom Government that its argument means that the action should be dismissed without an examination of the content of the contested decision because, in reality, only the objective pursued by the action of the European Union is truly relevant for finding an infringement of Article 47 EU in the present case.

88. In spite of the subtlety of the analysis offered by the United Kingdom Government, it seems to me that its argument is based on certain erroneous premises concerning the interpretation of Article 47 EU developed by the Court's case-law, which should lead to the refutation of its argument.

89. As a general observation, it will be observed first of all that the United Kingdom Government does not claim that the European Union could adopt an action on the basis of the CFSP pursuing a socio-economic development cooperation objective without infringing Article 47 EU. The Government appears to accept, following the express position of the Council on this point, that the European Union could not pursue such an objective in the framework of Title V of the EU Treaty. In any case, both the Council and the United Kingdom Government submit that the contested decision and the contested Joint Action pursue an objective within the scope of the CFSP.

90. On the other hand, the United Kingdom Government maintains that, because of the concurrent competences, the Community is never prevented from adopting an action by way of development cooperation even where the European Union has, in the framework of the CFSP, adopted an action which has a similar content (namely, in the present case, financial and/or technical assistance to an African regional organisation) but pursues one of the aims of Article 11(1) EU, in the present case, preserving peace and strengthening international security. This argument rests in part on the premise that, by virtue of the Court's case-law, two independent conditions must be satisfied in order to find an infringement of Article 47 EU: first, the Community must be competent to adopt an

33 — See points 70 to 72 of the statement in intervention of the United Kingdom Government.

act whose content and, more importantly, objective are similar to those of the measure adopted by the European Union and, second, there must be an encroachment on the competences of the Community.

91. First of all, it must be recalled that, under Article 47 EU, no provision of the EC Treaty can be affected by a provision of the EU Treaty. [34]

92. The function of Article 47 EU is to protect the competences which the provisions of the EC Treaty confer on the Community against any encroachment by acts which are claimed by the Council to fall within the scope of Titles V and VI of the EU Treaty. [35]

93. It will also be recalled that, in Case C-176/03 *Commission* v *Council*, the Court allowed the Commission's action for the annulment of Council Framework Decision 2003/80/JHA, adopted under Title VI of the EU Treaty, on the protection of the environment through criminal law, [36] by finding that, *on account of both their aim and their content,* Articles 1 to 7 of the framework decision had as their main purpose the protection of the environment and they *could have been properly adopted* on the basis of Article 175 EC. [37]

94. The Court went on to add that '*[i]n those circumstances*, the entire framework decision, being indivisible, infringes Article 47 EU *as it encroaches* on the powers which Article 175 EC confers on the Community'. [38]

95. Contrary to what is suggested by the United Kingdom Government, those passages in the judgment in Case C-176/03 do not indicate that the existence of an encroachment on the powers of the Community may constitute a condition independent of that which includes examination of the content and purpose of the contested act. On the contrary, it appears that, by beginning paragraph 53 of that judgment with the words 'in those circumstances', the Court derived the encroachment on the powers of the Community and thus the infringement of Article 47 EU from its preceding examination of the aim and the content of the Council's

34 — Case C-176/03 *Commission* v *Council*, paragraph 38.

35 — See Case C-170/96 *Commission* v *Council*, paragraph 16, and Case C-176/03 *Commission* v *Council*, paragraph 39.

36 — This framework decision was published in OJ 2003 L 29, p. 55.

37 — Judgment cited above (paragraph 51) (italics added). The Court thus, as stated at paragraph 45 of the judgment, applied its settled case-law on the choice of the legal basis for a Community measure, by virtue of which that choice 'must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure'.

38 — Idem (paragraph 53) (italics added).

framework decision. So it was on the basis of that examination that the Court was able to find that Article 47 EU had been infringed, and there was no need further to ascertain whether an alleged additional condition of encroachment on the Community's powers was fulfilled.

96. Next it is necessary to examine the argument of the United Kingdom Government that, because of the concurrent or complementary nature of the Community's competences by comparison with those of the Member States in the field of development cooperation, [39] an action of the European Union pursuing a CFSP objective could never encroach on the Community's powers in the field of development cooperation.

97. On that point it must be observed, first, that this general approach remains at least subject to examination by the Court of the authentic nature of the CFSP objective pursued by the European Union by virtue of Title V of the EU Treaty because the Union cannot, as the Council and the United Kingdom Government admit, pursue a development cooperation objective which has not been assigned to it by the EU Treaty. [40]

98. Second, it must be noted that Article 47 EU makes no gradation in the protection it confers on the provisions of the EC Treaty according to the distribution of competences between the Member States and the Community and hence the nature of the competences assigned to the Community. Article 47 EU therefore appears to rest on the presumption that all the competences given to the Community, irrespective of the distribution that exists between the Community and the Member States, deserve to be protected against any encroachment on the part of the European Union by adopting a measure based on Titles V and/or VI of the EU Treaty.

99. It is also clear from Case C-170/96 *Commission* v *Council* and Case C-176/03 *Commission* v *Council* that the Court examined the possible infringement of Article 47 EU by measures adopted by the European Union in areas (visas and environmental

39 — It should be borne in mind, for what it may be worth, that Article I-12 of the draft Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1) distinguishes between three 'categories' of competences of the Union (fused with the Community), namely exclusive competence, competence shared with the Member States in a specific area in which they exercise their competence 'to the extent that the Union has not exercised, or has decided to cease exercising, its competence', and (undefined) competence in certain areas 'to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas'.

40 — According to the Court's case-law, the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but, as pointed out in footnote 37 above, must be based on objective factors which are amenable to judicial review: see inter alia Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11, and Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10.

policy) which do not fall within the scope of the exclusive competence of the Community, but belong to the sphere of competence shared between the Community and the Member States, and in which the Community had not then acted.

100. This appears to be evidence that the nature of the competence given to the Community and the distribution of competences between it and the Member States are immaterial for the purpose of applying Article 47 EU, provided that competence exists. However, it cannot be denied that Community competence in the field of development cooperation exists, as shown by the provisions of Title XX of the EU Treaty.

101. To be sure, it is true that, as the United Kingdom Government submits, the Community's competence for development cooperation complements that of the Member States.

102. The Community's policy in the sphere of development cooperation, referred to in Article 3(1)(r) EC and in Title XX of the EC Treaty, is, in the words of Article 177(1) EC, 'complementary to the policies pursued by the Member States'. Article 180(1) EC provides also that '[t]he Community and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes' and 'may undertake joint action'. The first paragraph of Article 181 adds that '[w]ithin their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations', while the second paragraph states that the Community's competence in that sphere 'shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'.

103. There is thus no doubt that, as the Court had already held in a judgment of 2 March 1994 — which was delivered after the EU Treaty entered into force but the facts of which were prior to that date — in that sphere the Community's competence is not exclusive. [41] Furthermore, the Court confirmed that assessment after the entry into force of the EU Treaty in the case of *Portugal* v *Council*. [42]

104. In Case C-316/91 *Parliament* v *Council* the Court concluded, from the finding that

41 — Case C-316/91 *Parliament* v *Council* [1994] ECR I-625, paragraph 26.

42 — Case C-268/94 [1996] ECR I-6177, paragraph 36. However, the Court made it clear that the Community had specific competence to conclude agreements with non-member countries in the sphere of development cooperation.

the Community's competence was not exclusive, that the Member States were entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community. [43]

105. Although the Court did not make a positive assessment of the competence exercised by the Community, it must be noted that, following Advocate General Jacobs in his Opinion in that case, the Court rejected all the Parliament's arguments claiming in particular that, as the Community had exercised its competence, the Member States could no longer exercise theirs. [44] In the view of Advocate General Jacobs, that argument was unacceptable in an area where the Community and the Member States enjoy concurrent competence. [45]

106. In a judgment from the same period, cited several times by the parties to the present action, in which the question arose of whether the decision challenged by the European Parliament was a challengeable act within the meaning of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Court also observed that the Community did not have exclusive competence in the field of humanitarian aid, and that consequently the Member States were not precluded from exercising their competence in that regard collectively *in the Council or outside it*. [46]

107. It follows that, contrary to what is suggested by the Commission in its pleadings, in the sphere of development cooperation the Member State are not prevented from exercising their own competence, even where the Community has exercised its own in the sphere in question. [47]

108. Any other interpretation of the provisions of Title XX of the EC Treaty would render totally ineffective the obligation laid down in Article 180 EC for the Community and the Member States to coordinate their policies on development cooperation and to consult each other on their aid programmes.

43 — Idem.

44 — Paragraph 42 of the Opinion in Case C-316/91.

45 — See paragraphs 44 and 50 of the Opinion.

46 — Joined Cases C-181/91 and C-248/91 *Parliament* v *Council and Commission* [1993] ECR I-3685, paragraph 16 (italics added).

47 — Of course, the existence of concurrent competences in development cooperation does not mean that, in exercising their own competence, the Member States are not subject to the obligation of loyal cooperation arising from Article 10 EC. In addition, that obligation is defined by the need to coordinate Community and national policies on development cooperation laid down in Article 180(1) EC. A Member State could not, for example, in the framework of its bilateral policy maintain or renew a development aid programme for a third State for which the Community had decided to suspend its own contributions on the ground of, in particular, a serious breach of human rights in that State.

The interpretation put forward by the Commission would also make it difficult to understand the option given to the Community and the Member States to undertake joint actions pursuant to Article 180(1) EC.

109. The Cooperation Agreement between the European Community and the Republic of India on Partnership and Development, [48] which was at issue in *Portugal* v *Council*, is moreover an example of the concurrent or complementary competences of the Community and the Member States. Article 25 of that Agreement provides that neither the agreement nor any action taken thereunder is in any way to affect the powers of the Member States of the Communities to undertake bilateral activities with India in the framework of economic cooperation or to conclude, where appropriate, new economic cooperation agreements with India. The Court concluded from that provision that 'the mere inclusion [in the agreement] of provisions for cooperation in a specific field … does not … predetermine the allocation of spheres of competence between the Community and the Member States or the legal basis of Community acts for implementing cooperation in such a field'. [49]

110. Nevertheless, the distribution of spheres of competence between the Community and the Member States must be distinguished from the distribution of spheres of competence governed by Article 47 EU between the Community and the European Union, acting in the framework of the second and third pillars. [50]

111. Whereas the Member States are in principle free to act, [51] action of the European Union under Titles V and VI of the EU Treaty is in principle excluded because adequate competences are provided for by the EC Treaty, irrespective of the nature of those competences (exclusive, shared or concurrent) assigned to the Community.

112. If the High Contracting Parties had had the intention of delimiting the scope of Article 47 EU according to the distribution of competences between the Community and the Member States, that article would certainly not have been worded in such a way that, apart from the provisions expressly referred to by Article 47 EU, 'nothing' in the EU Treaty 'shall affect' the EC Treaty.

113. The fact that the Member States are free to act collectively does not appear to be

48 — OJ 1994 L 233, p. 35.

49 — Judgment cited above (paragraph 47).

50 — See to that effect, point 58 of the Opinion of Advocate General Mazák in Case C-440/05 *Commission* v *Council*, pending.

51 — With the exception of the exclusive competence of the Community and the situation where the Community has exercised its competence in an area where it shares concurrently competence with the Member States.

inconsistent with the fact that the European Union is itself prevented from undertaking any action pursuant to Titles V and VI of the EU Treaty which may fall within the scope of the Community's competences.

114. Apart from the fact that, as the Commission submits and as admitted by the Council and the United Kingdom Government, the Member States do not exercise their competence collectively when an action is adopted by an act of the Council by virtue of Title V of the EU Treaty, still less when that act, like the contested decision, can be adopted by a qualified majority, [52] the judgments in Case C-170/96 *Commission* v *Council* and Case C-176/03 *Commission* v *Council* did not exclude a possible infringement of Article 47 EU by the European Union acting in the framework of Title VI of the EU Treaty — the later judgment even finding, as we have already seen, that there was an encroachment on the powers of the Community — even where the Community had not yet acted in the areas in question and, therefore, the Member States in principle retained the competence to act in those areas.

115. I see no reason why, in the context of the relationship between Title V of the EU Treaty and the Community development cooperation policy, the interpretation and scope of Article 47 EU should depend on the distribution of competences between the Community and the Member States pursuant to the EC Treaty.

116. As already outlined above, Article 47 EU aims to keep watertight, so to speak, the primacy of Community action under the EC Treaty over actions undertaken on the basis of Title V and/or Title VI of the EU Treaty, so that if an action *could* be undertaken on the basis of the EC Treaty, it *must* be undertaken by virtue of that Treaty. [53]

117. The safeguarding of Community action also follows from several other provisions of the EU Treaty.

118. It is true that, in relation to external activity, Article 11(1) of the EU Treaty confers on the CFSP a scope 'covering all areas of foreign and security policy', a term which is broad enough to include the Community policy on development cooperation.

52 — In accordance with Article 23(2) EU, the Council acts by qualified majority in particular when adopting any decision implementing a joint action or a common position.

53 — See, also to that effect, point 53 of the opinion of Advocate General Mazák, cited above.

119. However, that provision, which is in Title V of the EU Treaty, cannot be read in isolation, but must be interpreted in the light of the common and final provisions of that Treaty, which refer to the European Union as a 'façade' of the three pillars.

120. Thus it will be noted that, as well as Article 47 EU, Article 1 EU states that the policies and forms of cooperation established by that Treaty, in particular the CFSP, *supplement* the European Communities, while Article 2 EU adds that the European Union has as an objective 'to maintain in full the *acquis communautaire* and build on it', this being repeated in a slightly different form in the first paragraph of Article 3 EU.

121. Therefore it is indeed a matter of protecting the Community's areas of activity, so that the European Union must refrain from interfering in those areas by using forms of cooperation less integrated than those provided for by the EC Treaty, namely those provided for under Titles V and VI of the EU Treaty. Although, from an objective viewpoint, the reference to the concept of *acquis communautaire* remains imprecise, it undoubtedly encompasses all the competences conferred upon the Community.

122. In the final analysis, it might be suggested that the CFSP covers 'all areas of foreign and security policy', with the exception of the forms of foreign policy which fall within the competence of the Community, such as the common commercial policy or the development cooperation policy, irrespective of the distribution of competences between the Member States and the Community. This approach appears to be the only one which ensures overall coherence of the provisions of the EU Treaty.

123. This argument is borne out, *a contrario*, by the only bridge specifically established by the Maastricht Treaty and retained in the current version of the EU Treaty, in accordance with Article 47 EU, [54] between Community activity involving economic sanctions under Articles 60 EC and 301 EC and the objectives of the EU Treaty specified in Article 11(1) concerning external relations. These provisions, which are quite special provisions of the EC Treaty, [55] expressly envisage that the European Union, acting pursuant to Title V of the EU Treaty, may *provide for* action by the Community aiming at interrupting or reducing, entirely or in part, economic relations with one or more third countries, thus rendering Community action subordinate to that decided on in the framework of the CFSP.

54 — If, as provided by that article, no provision of the EU Treaty affects the EC Treaty, that is only 'subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community'.

55 — See Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-3533, paragraph 160, and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, paragraph 124. It should be noted that appeals have been lodged against both those judgments. The appeals, which are at present pending, have been registered under case numbers C-415/05 P and C-402/05 P.

124. Furthermore, I doubt whether an action of the European Union under Title V of the EU Treaty could *ever* encroach on the Community's competence in relation to development cooperation, contrary to the allegation of the United Kingdom Government.

125. In that connection, it will be recalled that the United Kingdom Government itself concedes that encroachment could be ruled out only if the European Union action pursues a CFSP objective under Title V of the EU Treaty. However, as I have already said, the authentic nature of such an aim must nevertheless always be verified by the Court in order to rule out an alleged infringement of Article 47 EU.

126. In addition, the very cautious wording of Article 8 of the contested Joint Action, which states that the Council '*notes* that the Commission intends to direct its action towards achieving the objectives and the priorities of [the contested] Joint Action, *where appropriate by pertinent Community measures*', [56] shows clearly that the Council is well aware that, in general, an action which it adopts pursuant to Title V of the EU Treaty is liable to encroach on the Community's powers in relation to development cooperation.

127. It follows that the interpretation and the scope of Article 47 EU cannot be a function of the distribution of competences between the Community and the Member States by virtue of the EC Treaty.

128. Therefore the question to be examined by the Court in the present case is whether, by virtue of the competences conferred upon the Community in relation to development cooperation, the contested decision, having regard to its objective and its content, and in the light of the contested Joint Action which it aims to implement, could have been adopted by the Commission under Title XX of the EC Treaty.

129. However, the Court's examination depends on the question, also fiercely disputed between the parties, whether the campaign against the proliferation of small arms and light weapons falls outside the competence of the Community as such. If that were the case, in principle the action would have to be dismissed.

56 — Italics added.

2. Relationship between the campaign against the proliferation of small arms and light weapons and Community competence

(a) Arguments of the parties

130. According to the Commission and the Parliament, in so far as the campaign against the proliferation of small arms and light weapons has become an integral part of the policy of development cooperation, that campaign falls within the scope of the competences conferred on the Community in that field.

131. 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 aim of stability, the policy of mine clearance and decommissioning of small arms and light weapons is an indispensable means of achieving the objectives of the development cooperation policy.

132. The Commission claims that the integration of the campaign against small arms and light weapons into the Community policy of development cooperation was established in the framework of the Cotonou Agreement, although that is a mixed agreement. The fact that the decommissioning of small arms and light weapons forms part of the Community development cooperation policy is confirmed by its inclusion in the planning initiated by the regional indicative programme for West Africa of 19 February 2003 and by the inclusion in the Chapter CFSP of the general budget of the European Union for 2004 of an item intended for the financing of operations concerning the campaign against the proliferation of light weapons and illegal trafficking in weapons in so far as such actions are not already covered by the Cotonou Agreement, which provides for the same type of actions in the ACP countries.

133. The connection between the development cooperation policy and the destabilising accumulation of small arms and light weapons has moreover been recognised by the Council itself and by the international community. In its reply to the statements in intervention, the Commission points out that this does not exclude the possibility that certain aspects of the campaign against small arms and light weapons may fall within the scope of the CFSP, depending on their purpose and their content.

134. The Council, supported by all the intervening governments, considers that the campaign against small arms and light weapons does not fall within the competences assigned to the Community.

135. Neither the campaign against 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 Community listed in Articles 2 EC and 3 EC, and instead they fall exclusively within the ambit of the EU Treaty, in particular the CFSP. On the other hand, according to Article 177(1) EC, the main aim of the Community policy of development cooperation is the reduction of poverty. The provisions of the EC Treaty cannot be interpreted broadly so as to undermine the coexistence of the Union and the Community as legal orders which are integrated but distinct, like the constitutional architecture of the pillars.

136. 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 long-term development does not mean that the whole of that area falls within Community competences. The Council and the United Kingdom Government stress that, if the Commission's argument were accepted, the CFSP would be of no practical effect at all.

137. The Council, supported by the Spanish, French, Swedish and United Kingdom Governments, stresses that Community competence for combating the spread of small arms and light weapons cannot be inferred from the Cotonou Agreement either, as that is a mixed agreement, or from the other instruments referred to by the Commission.

138. At the hearing, the French Government pointed out that Article 3 of Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability [57] confirms that Community aid for development does not include support for measures to combat the proliferation of small arms and light weapons.

(b) Analysis

(i) Introductory remarks

139. Two introductory remarks are required with regard to the Commission's arguments.

140. First, it must be noted that, in the course of the present proceedings, the Commission has significantly modified its

57 — OJ 2006 L 327, p. 1.

position with regard to the connection that exists, in its opinion, between combating the proliferation of small arms and light weapons and Community policy on development cooperation. Whereas in its application the Commission basically argued that action against the proliferation of those arms formed an integral part of the Community policy on development cooperation, and even of any development policy, [58] in its reply to the statements in intervention it argued that such action falls within the competence of the Community *in so far as* it has become an integral part of Community policy on development cooperation while admitting, consequently, that certain aspects of the action may be covered by the CFSP. [59]

141. The Commission's modification in its written observations is liable to complicate the analysis because, if it were to be followed, that approach could mean that criteria would have to be determined for distinguishing those aspects of the combat against the proliferation of small arms and light weapons which fall within the scope of development cooperation from those that are covered by the CFSP.

142. On that point, as the Commission's oral argument makes clear, the Commission appears to draw a demarcation line relating to the nature of the actions in question between, on the one hand, political actions such as the deployment of military or police missions to disarm local militia or the decision to dismantle factories producing light weapons, actions which are covered by the CFSP, and, on the other hand, technical and financial actions for supporting local initiatives in the sphere in question, which fall within the Community competence for development cooperation.

143. On the other hand, it must be borne in mind that the Council and the intervening governments categorically reject the argument that combating the spread of small arms and light weapons falls within the scope, even partially, of development cooperation.

144. Secondly, I note that the Commission's pleadings allege, rather sporadically, that the contested decision and the contested Joint Action also encroached on the Commission's competences on the basis of Article 181a EC, the sole article forming Title XXI of the EC Treaty concerning 'economic, financial and technical cooperation with third countries'. [60]

58 — See points 38 and 40 of the application.

59 — See points 16 and also 9, 11, 12 and 19 of the Commission's observations on the statements in intervention.

60 — See points 52, 60 and 63 of the application.

145. Title XXI was added to the EC Treaty in the revision resulting from the Treaty of Nice. Article 181a EC provides that, without prejudice to the provisions of the EC Treaty, and in particular those of Title XX, the Community is to carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries.

146. Before that article came into force, and in so far as the Community instruments did not fall within the scope of other policies, the Community adopted measures and concluded cooperation agreements with third countries which were not developing countries on the basis of Article 235 of the EC Treaty (now Article 308 EC), in default of a specific legal basis. [61].

147. The addition of the new Title XXI to the EC Treaty therefore creates a specific legal basis for such cooperation and eases the procedure for the adoption of Community initiatives in that sphere by replacing the requirement of unanimity laid down by Article 308 EC with a qualified majority of the Council.

148. In so far as Article 181a EC applies without prejudice to Title XX on development cooperation, that article does not extend to cooperation with third countries which are developing countries, as the Commission concedes in its pleadings. [62]

149. Although the concept of 'developing country', which is used several times in the provisions of the EC Treaty, is not defined, it is very clear in the present case that all the States which are parties to ECOWAS, the beneficiary of the contested decision, are contracting parties to the Cotonou Agreement and are included among the developing countries, whatever the criteria and indexes

61 — See, for example, Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ 1989 L 375, p. 11); Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC (OJ 2000 L 306, p. 1), and Council Regulation (EC) No 382/2001 of 26 February 2001 concerning the implementation of projects promoting cooperation and commercial relations between the European Union and the industrialised countries of North America, the Far East and Australasia and repealing Regulation (EC) No 1035/1999 (OJ 2001 L 57, p. 10). According to the case-law, the use of Article 308 EC as the legal basis for a measure is justified only where no other provision of the EC Treaty gives the Community institutions the necessary power to adopt the measure in question: see *Portugal* v *Council*, paragraph 21 and case-law cited.

62 — See, for example, point 20 of the application.

used for defining that concept.[63] Accordingly, in its communication of 26 April 2000 to the Council and the European Parliament on the European Community's development policy, the Commission included in the category of developing countries from the economic, social and structural viewpoints all the countries which in the past had benefited from the application of the Lomé Convention (since replaced by the Cotonou Agreement).[64]

150. Consequently, it is only in relation to the Community competence in the field of development cooperation that the connection between the latter and combating the proliferation of small arms and light weapons must be examined.

63 — The World Bank normally uses the term 'developing countries' to refer to low-income and middle-income countries on the basis of gross national income per inhabitant. Since 2005 the OECD Development Assistance Committee has used the same criteria, which were taken up by Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ 2006 L 378, p. 41), Annex II to which refers to developing countries as defined by the OECD Development Assistance Committee, including among others the Member States of ECOWAS. It should also be noted that, since the 1970s, the United Nations Conference on Trade and Development (UNCTAD) has drawn up a list of less advanced countries which is updated every three years, the latest list being based on three criteria relating to gross national income per inhabitant, human capital on the basis of a 'human assets index' and economic vulnerability. In 2006 12 of the 15 Member States of ECOWAS were on the UNCTAD list of less advanced countries, the exceptions being Côte d'Ivoire, Nigeria and Liberia: see http://www.unctad.org/Templates/Page.asp?intItemID=3641&lang=2.

64 — COM (2000) 212 final, p. 5. See also Article 30 of and Annex II to Regulation No 1905/2006.

(ii) Scope of development cooperation

151. Before considering this question, we should recall the terms of Article 177 EC.

152. According to Article 177(1) EC, 'Community policy in the sphere of development cooperation … shall foster:

— the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,

— the smooth and gradual integration of the developing countries into the world economy,

— the campaign against poverty in the developing countries.'

153. Article 177(2) EC adds that Community policy in that area is to contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms.

154. Under Article 177(3) EC, the Community is to comply with the commitments and to take account of the objectives approved in the context of the United Nations and other competent international organisations.

155. Article 177(1) EC shows that the objectives of the development cooperation policy are primarily economic and social. In pursuing those objectives, the Community must contribute to the general political objective set out in Article 177(2) EC.

156. No doubt, in the light of Article 177(3) EC it could be suggested that the list in Article 177(1) EC is not exhaustive in so far as the Community must take account of objectives approved at the international level, including in particular those in the context of the United Nations.

157. However, apart from the fact that the Community only has to 'take account' of the objectives approved in the context of the competent international organisations, that phrase does not in any case mean that those objectives could properly contribute to enlarging those assigned to the Community under Title XX of the EC Treaty, to the point that any initiative of the European Union and/or the Community intended for developing States would then fall within the scope of the Community development policy.[65]

158. Any different interpretation would certainly be contrary to Article 5 EC, which provides, as will be recalled, that the Community can act only within the limits of the powers conferred upon it by the EC Treaty and of the objectives assigned to it therein.

159. However, the preservation of peace and strengthening of international security cannot be made to refer to any of the aims expressly assigned to the Community by Articles 2 EC and 3 EC or, more broadly, to the preamble to the EC Treaty. Even if the preservation of peace and strengthening of

65 — It will also be noted that the eight Millennium Development Goals approved in 2000 under the aegis of the United Nations, and which the Member States of the Community are endeavouring to attain, concentrate mainly on securing the vital elementary needs of populations, on the campaign against poverty and on social and economic development, namely to eradicate extreme poverty and hunger, to achieve universal primary education, to promote gender equality and empower women, to reduce the mortality rate of children, to improve maternal health, to combat HIV/AIDS, malaria and other diseases, to ensure environmental sustainability and to develop a global partnership for development: see recently the Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the Parliament and the Commission on European Union Development Policy: The European Consensus on Development, OJ 2006 C 46, p. 1.

international security must inspire action by the Community, they do not fall within the scope of the EC Treaty, but within the objectives of the EU Treaty, in part the CFSP, in accordance with Article 11(1) EU. [66]

160. The social and economic nature of the objectives pursued by the Community development cooperation policy was confirmed by the Court in *Portugal* v *Council*.

161. In that judgment it is true that the Court accepted that the objectives pursued by Article 130u of the EC Treaty (now Article 177 EC) are broad objectives in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters. [67] Nevertheless, the Court added, first, that in order to be duly adopted on the basis of Article 130y of the EC Treaty (now Article 181 EC), the clauses of an agreement on cooperation in those different specific matters cannot include obligations which in reality constitute objectives distinct from those of development cooperation [68] and verified, second, in the context of examining one of the clauses of the agreement relating to cooperation between the contracting parties in combating drugs, whether that clause remained within the limits necessary for pursuing the objectives of 'economic and social development' referred to in Article 130u of the EC Treaty or the 'social and economic' objectives of development cooperation, without requiring recourse to a competence and to a legal basis specific to the matter in question. [69]

162. That approach may appear relatively strict with regard to the delimitation of the objectives pursued by development cooperation.

163. However, this relative rigour is counterbalanced, as illustrated by the judgment in *Portugal* v *Council*, by the possibility of including in the scope of development cooperation a broad range of matters, provided that they contribute to the attainment of the objectives of Article 177 EC.

164. Thus the Community adopted Regulation (EC) No 1724/2001 of the European Parliament and of the Council of 23 July 2001

66 — See, to that effect, *Yusuf and Al Barakaat International Foundation* (paragraphs 152 to 155) and *Kadi* (paragraphs 116 to 119).

67 — *Portugal* v *Council*, paragraph 37.

68 — Idem, paragraph 39.

69 — Ibidem, paragraphs 60, 61 and 63.

concerning action against anti-personnel landmines in developing countries,[70] which, according to its Article 2, aims to assist countries which suffer from the consequences of such mines 'to create the conditions necessary for their economic and social development', while pointing out, in recital 15, that it is necessary to ensure that the Community's actions pursuant to that regulation are consistent with the European Union's foreign policy as a whole, including the CFSP.

165. The example of mine clearance projects shows that measures connected with security may fall within the ambit of development aid provided that they serve to attain the objectives of social and economic development of Article 177 EC.

166. In my view, delimiting the objectives of development cooperation in that way, without the matters which may be the subject of such cooperation falling *a priori* outside its scope, makes it possible to ensure the dynamic nature of that policy, while ensuring that the Commission observes the principle of the distribution of competences and the assignment of objectives laid down in Article 5 EC.

167. I think that approach is also consistent with the general scheme of the EC Treaty, which aims to attain limited objectives with the aid of extensive means, and not the reverse.

168. However, there remains the question of the degree of the connection which must exist between a given measure and the objectives of social and economic development of Article 177 EC for that measure to fall within Community competence under Title XX of the EC Treaty.

169. It cannot be denied that there is a connection between the preservation of peace and strengthening of international security, referred to in Article 11(1) EU, and the prevention of violent conflicts on the one hand and development on the other hand. None of the parties to the present action denies this, and indeed it is undeniable that the armed conflicts that devastate many countries in the world and the insecurity prevailing in those countries are obstacles to their development.[71]

170. However, such a connection cannot lead to including in the scope of development cooperation measures which would lead to disregarding the distribution of competences

70 — OJ 2001 L 234, p. 1. On 1 January 2007 this regulation was repealed and replaced by Regulation (EC) No 1717/2006.

71 — See paragraph 37 of the statement on the European Consensus on Development.

in the framework of the pillar architecture of the European Union.

171. It would be erroneous and excessive to consider that any measure which *fosters* the economic and social development of a developing country falls within the competence of the Community pursuant to Title XX of the EC Treaty.

172. Any other interpretation would undoubtedly deprive the other Community policies, such as the common commercial policy, of their reason for existence and render them ineffective. [72] It would also be likely to harm the practical effect of the provisions of Title V of the EU Treaty, in spite of the limits on the actions of the Community laid down by Article 5 EC.

173. Where a measure is likely to fall within the scope of the aims of the CFSP and also to contribute to the social and economic aims of the Community development cooperation policy, it is necessary, having regard to the content and purpose of that measure, to seek its main aim in order to secure a balance between the observance of Article 47 EU and of Article 5 EC.

174. That approach was taken by the Court in Case C-176/03 *Commission* v *Council*, in which, it will be recalled, the Court annulled Articles 2 to 7 of Framework Decision 2003/80/JHA although they entailed partial harmonisation of the criminal laws of the Member States [73] in so far as an examination of their aim and content had shown that they had '*as their main purpose* the protection of the environment'. [74]

175. Reading Articles 47 EU and 5 EC in conjunction must also lead to the conclusion that, if a European Union action pursues the main aim of preserving peace and strengthening international security (and *a fortiori* if that is the exclusive aim) while at the same time contributing indirectly to the social and economic development of developing coun-

72 — Before the Community was formally given its own competence for development, the Court found, with regard to the application of the system of general tariff preferences on certain products from developing countries, that although that system reflected a new concept of international trade relations in which development aims played a major role, the 'link with development problems' did not cause a measure to be excluded from the sphere of the common commercial policy: see Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraphs 18 and 20.

73 — Paragraph 47.

74 — Idem, paragraph 51 (italics added).

tries, any encroachment on the Community's competences is precluded.

176. On the other hand, if the two aims of the measure are indissociably linked, without one being secondary and indirect in relation to the other, [75] the special nature of the relationship between the European Union and the Community should lead to priority being given to the Community legal basis because, in the context of that relationship, it seems to me particularly difficult, if not impossible as the law of the European Union stands at present, to contemplate recourse to a dual legal basis without breaching Article 47 EU. [76]

75 — According to the criterion developed by the Court's case-law, see Case C-178/03 *Commission* v *Parliament and Council* [2006] ECR I-107, paragraphs 42 and 43 and the case-law cited.

76 — It should be borne in mind that, in the context of the EC Treaty, recourse to a dual legal basis is exceptional and is precluded where, although the aims of the act in question are inseparably connected, the procedures laid down for one or the other of the legal bases are incompatible and/or where the use of two legal bases is liable to undermine the rights of the Parliament: see *Commission* v *Parliament and Council*, paragraph 57 and case-law cited. In a case concerning the distribution of competences between the second and the first pillars of the European Union, the use of two legal bases would also appear impossible in view of the different procedural requirements laid down in the framework of Title V of the EU Treaty and in that of Title XX of the EC Treaty. Accordingly, whereas a joint action pursuing a CFSP objective is, in principle, adopted solely by the Council acting unanimously (subject to the application of Article 23(2) EU), in the matter of development cooperation Article 179(1) EC provides that 'the measures necessary to further the objectives referred to in Article 177 [EC]' are to be adopted by the Council acting in accordance with the so-called co-decision procedure. Likewise it is also doubtful whether the procedures for adopting decisions granting financial and/or technical support and based on acts of a general nature in one or the other pillar can be reconciled, because in the context of Title V of the EU Treaty competence for adopting such decisions falls to the Council, whereas in the context of development cooperation it will be for the Commission to adopt measures of financial and/or technical support.

(iii) Combating the proliferation of small arms and light weapons and development cooperation

177. The foregoing assessments show that combating the proliferation of small arms and light weapons cannot be totally excluded from the scope of the Community policy on development cooperation.

178. That subject, like combating drugs and mine clearance, is not in principle excluded from the area of unilateral measures or agreements concluded by the Community with third countries concerning development cooperation, provided that the actions which are being carried out or are envisaged have development cooperation as their main aim by contributing to attaining the social and economic objectives of that policy.

179. I think that reasoning is borne out by the initiatives of the institutions of the European Union for preventing the proliferation of small arms and light weapons.

180. During the period of the cold war many States accumulated very considerable stocks of conventional weapons which, when the cold war ended, and for various reasons connected in particular with the collapse of state structures, fuelled the principal armed conflicts of the 1990s. [77]

181. On 26 June 1997, a few days after the European Council of Amsterdam, the Council of the European Union adopted the first political initiative of the European Union in the sphere of combating the proliferation of small arms and light weapons in the form of a 'programme for preventing and combating illicit trafficking in conventional arms' [78] ('the 1997 Programme'). The 1997 Programme, which was in response to several resolutions adopted by the General Assembly of the United Nations, [79] comprised an internal section addressed to the Member States, which were to intensify their collective efforts to prevent and combat illegal trafficking of arms in their territory [80] and an external section announcing that the Community and the Member States would, within the limits of their respective competence, take concerted action to assist other countries to prevent trafficking of arms and, especially in 'post-conflict' situations and in situations where a minimal degree of security and stability existed, in suppressing the illegal circulation and trafficking of arms. [81] Among the aid measures envisaged by the external section of the 1997 Programme were the adoption or strengthening, as appropriate, of an adequate body of laws and administrative measures for regulating and monitoring effectively transfers of weapons; the setting up of programmes for the collection, buying back and destruction of weapons; the setting up of educational programmes to promote awareness among the local population of the negative consequences of illicit trafficking of arms; and the promotion of the integration of former combatants in civilian life.

77 — See the discussion at points 1 to 8 of the European Union Strategy to combat illicit accumulation and trafficking of small arms and light weapons and their ammunition, adopted by the European Council at the meeting of 15 and 16 December 2005 (Doc. No 5319/06 CFSP 31). According to this document, more than 600 million small arms were in circulation in the world and, of 49 major armed conflicts in the 1990s, 47 were fought with small arms and light weapons as the main weapons. According to a study of May 2004, between 8 and 10 million small arms were in circulation illegally in West Africa: see A.Bah, *Implementing the ECOWAS Small Arms Moratorium in Post-War Sierra Leone*, working paper of the Small Arms Working Group of the Canadian Peacebuilding Coordinating Committee, Ploughshares, Ontario, 2004, p. 3. This document is available at the following internet address: www.ploughshares.ca/libraries/WorkingPapers/wp041eng.pdf

78 — The text of the programme is available at the following internet address: http://grip.org/bdg/g1657.html

79 — The 1997 Programme mentions resolutions 51/45 F, 'Measures to curb the illicit traffic and use of conventional arms', 51/45 L, 'Assistance to States for curbing the illicit traffic in small arms and collecting them', and 51/45 N, 'Consolidation of peace through practical disarmament measures', all three adopted at the 79th plenary session of the United Nations of 10 December 1996. In the last mentioned resolution, the General Assembly of the United Nations states that it is '[c]onvinced that a comprehensive and integrated approach towards certain practical disarmament measures, such as, inter alia, arms control, particularly with regard to small arms and light weapons … often is a prerequisite to maintaining and consolidating peace and security and thus provides a basis for effective rehabilitation and social and economic development'.

80 — Point 1 of the 1997 Programme.

81 — Points 2 and 3 of the 1997 Programme.

182. The 1997 Programme was supplemented and strengthened by Council Joint Action 1999/34/CFSP of 17 December 1998 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons, which was replaced by the contested Joint Action in 2002.

183. Several specific regional actions implementing Joint Action 1999/34/CFSP have been adopted by the European Union, [82] mainly in the form of financial contributions and technical assistance in the collection and destruction of small arms and light weapons. [83]

184. On 21 May 1999, referring to Joint Action 1999/34/CFSP, the Council adopted a resolution on small arms in which it pointed out that the proliferation of small arms and the lack of controls had fuelled internal or inter-State conflicts and had been an obstacle to peaceful economic and social development, [84] and 'recommend[ed] that in the field of development cooperation the Community and the Member States devote particular attention' to measures including the 'inclusion of the small arms issue in the political dialogue with ACP and other development cooperation partner countries of [the European Union]', '*development cooperation support for countries seeking assistance in the control or elimination of surplus small*

82 — Council Decision 1999/730/CFSP of 15 November 1999 implementing Joint Action 1999/34/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in Cambodia (OJ 1999 L 294, p. 5); Council Decision 1999/845/CFSP of 17 December 1999 implementing Joint Action 1999/34/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in Mozambique (OJ 1999 L 326, p. 73); Council Decision 2000/803/CFSP of 14 December 2000 implementing Joint Action 1999/34/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in South Ossetia (OJ 2000 L 326, p. 1); Council Decision 2001/200/CFSP of 12 March 2001 implementing Joint Action 1999/34/CFSP 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 2001 L 72, p. 1); and Council Decision 2001/850/CFSP of 29 November 2001 implementing Joint Action 1999/34/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in Albania (OJ 2001 JO L 318, p. 1).

83 — Like Decision 1999/845/CFSP, whereby the European Union made a financial contribution to the locating, collecting and destroying of weapons in Mozambique through the joint cross-border operations carried out by the South African Police and the Mozambique Police (Operation Rachel), Decision 2000/803/CFSP, granting aid in the form of equipment to the local police forces in South Ossetia responsible for the control, collection and destruction of small arms and light weapons in that region, and, to a lesser degree, Decision 1999/730/CFSP, making a financial contribution and giving technical assistance to the Cambodian Government for the development of appropriate laws and regulations on the ownership, possession, use, sale and transfer of arms and ammunition, for developing procedures for voluntary surrender of small arms and for identifying and destroying surplus small arms, and supporting civil society programmes to raise public awareness of problems related to small arms, and light weapons, and Decision 2001/850/CFSP, giving financial support to the small arms and light weapons control programme in Albania established under the United Nations Development Programme (UNDP), contributing, in particular, to the collection of arms in that State. By Decision 2001/200/CFSP the European Union made a financial contribution to the projects of the United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean, located in Lima, for the training of local customs and police officials.

84 — Point 1 of the resolution. The text of the resolution is available on the site http://grip.org/bdg/g1787.html

arms, as well as other incentives to encourage the voluntary surrender of small arms, and their destruction' and '*considering support, where necessary, to strengthen appropriate government institutions and legislation to better control small arms. The first interventions could be focused on … West Africa (ECOWAS), where significant progress has been made and frameworks for combating small arms proliferation have been developed and agreed*.' [85] In order to ensure a coordinated and complementary approach, the Council also asked for the coherence of European Union activities to be ensured at the Community level in relation to small arms, particularly with respect to the CFSP. [86]

185. The 1997 Programme and the Council resolution of 21 May 1999 show that the Council did not deny that the Community could conduct actions for combating the proliferation of small arms and light weapons within the limits of its competence in the field of development cooperation.

186. In the light of those documents drawn up by the Council, it seems inconsistent to argue, like the Council and the governments intervening before the Court, with the exception of the Netherlands Government, that combating the proliferation of small arms and light weapons under no circumstances falls within the scope of the Community policy on development cooperation.

187. It also seems to me that Article 11(3) of the Cotonou Agreement, the interpretation and scope of which have been much debated among the parties to the present dispute, although not explaining the distribution of competences between the Community and the Member States, cannot be interpreted as meaning that any Community action aiming to support the 'fight against … an excessive and uncontrolled … accumulation of small arms and light weapons' is ruled out.

188. On the other hand, as the Commission concedes, the mere mention of that matter in the Cotonou Agreement does not mean either that the European Union does not possess any competence to adopt measures and actions to fight against the proliferation of small arms and light weapons.

189. The delimitation between the respective competences of the Community and the European Union therefore goes in the

85 — Point 7 of the resolution (italics added).
86 — Point 9 of the resolution.

final analysis through the identification of the purpose of the measure in question according to whether it pursues the exclusive or principal objective of preserving peace and/or strengthening international security, thus falling within the scope of the CFSP, or of social and economic development, in which case it is covered by the Community development cooperation policy. This approach is also borne out by the explanatory notes to the CFSP chapter of the general budget of the European Union for 2004, which, although they are only a guide, show that both the Community and the European Union, the latter acting by virtue of Title V of the EU Treaty, are capable of adopting actions, according to their respective competence, to combat the accumulation of small arms and light weapons.

190. In addition, contrary to what was said by the French Government at the hearing, I do not think that, in the present case, the systematic exclusion of the campaign against the proliferation of small arms and light weapons from the ambit of the Community policy on development cooperation can be inferred from Article 3 of Regulation No 1717/2006. [87]

87 — It should be noted that such an argument, even though it was only presented at the hearing and relates to a Community act adopted after the application was lodged, had to be ruled admissible because it seeks to dispute the Community's competence to adopt measures in the area of the campaign against the proliferation of small arms and light weapons, which is a question of public policy and may therefore be raised by the Community court of its own motion.

191. Article 3(1) of that regulation provides that Community technical and financial assistance may be undertaken inter alia in response to a situation of urgency, crisis or emerging crisis, or a situation threatening to escalate into armed conflict or severely to destabilise the third country or countries concerned. Article 3(2) lists the areas to which technical and financial assistance applies. In that connection, the first indent of Article 3(2)(i) refers to 'support for measures to address, within the framework of Community cooperation policies and their objectives, the impact on the civilian population of the illicit use of and access to firearms; such support shall be limited to survey activities, victim assistance, raising public awareness and the development of legal and administrative expertise and good practice'. The second indent of Article 3(2)(i), which is emphasised by the French Government, adds that '[a]ssistance shall be provided only to the extent necessary to re-establish the conditions for social and economic development of the populations concerned, in a situation of crisis or emerging crisis as referred to in paragraph 1. It shall not include support for measures to combat the proliferation of arms'.

192. However, it must be observed that when the regulation, which came into force on 1 January 2007, was adopted, the Council and the Commission adopted a joint statement to the effect that those institutions agreed that 'nothing in [Regulation No 1717/2006] shall be construed as prejudging positions taken in Case [C-]91/05' and that '[u]ntil such time as the Court of Justice rules on that case

the Commission will not seek to take measures under Article 3(2)(i)' of the regulation, as the scope of that article would be revised as necessary, on the basis of a Commission proposal, in the light of the Court's judgment in the present case. [88]

193. In any case, if it were necessary to interpret the second indent of Article 3(2)(i) of Regulation No 1717/2006, it appears to exclude support for measures to combat the proliferation of arms only in relation to Community assistance in response to situations of crisis or emerging crisis, but not with regard to any Community measure contributing to the social and economic objectives of development cooperation, since, in particular, the assistance envisaged by Regulation No 1717/2006 is to be provided, as Article 2(1) states, only to the extent that it cannot be provided under other Community instruments for external assistance, which necessarily include geographical development cooperation instruments such as the Cotonou Agreement. As stated above, that agreement does not rule out the adoption by the Community of measures to contribute to the fight against the proliferation of small arms and light weapons.

194. For all those reasons I consider that the fight against the excessive accumulation of small arms and light weapons does not, as such, fall outside the Community development cooperation policy but, on the contrary, may fall within it where a measure contributing to that fight has the exclusive or main object of development cooperation by contributing to the social and economic development objectives of that cooperation.

195. Now it is necessary to examine the lawfulness of the contested decision and the contested Joint Action.

3. Lawfulness of the contested decision and the contested Joint Action

196. In the light of the judgment in Case C-176/03 *Commission* v *Council* and, as already stated, in order to determine whether, in adopting the contested decision, the Council encroached on the Commission's competence in the field of development cooperation, in breach of Article 47 EU, it is necessary to ascertain whether, having regard to its purpose and content, that decision had development cooperation at least as its main object.

88 — Document No 14010/06, CODEC 1113, PESC 966, 27 October 2006, p. 1.

197. With regard to the purpose of the contested decision, it must be observed that its first recital states 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.

198. The second recital in the preamble to the contested decision states that the European Union envisages operating within the relevant international forums to promote confidence-building measures. It points out that '[t]his Decision is accordingly intended to implement the [contested] Joint Action'. This recital must be read in the light of the single citation in the preamble to the contested decision, which refers to Article 3 of the contested Joint Action, which also mentions the establishment of confidence-building measures.

199. In the words of Article 3 of the contested Joint Action, in pursuing the objectives of that action, 'the Union shall aim at building consensus in the relevant international forums, and *in a regional context* as appropriate, *for the realisation of the following principles* and measures *to prevent the further destabilising accumulation* of small arms'. [89] The principles and measures referred to in Article 3 include '(a) a commitment by all countries to import and hold small arms only for their legitimate security needs', '(b) a commitment by exporting countries to supply small arms only to governments … in accordance with appropriate international and regional restrictive arms export criteria', '(c) a commitment by all countries to produce small arms only for holdings as outlined in (a) or exports as outlined in (b)', and '(e) the establishment of confidence-building measures, including measures to promote increased transparency and openness, through regional registers on small arms, and regular exchanges of available information on exports, imports, production and holdings of small arms, and on national weapons legislation, and through consultations between the relevant parties on the information exchanged'.

200. It must be borne in mind that the Commission in no way disputes that Article 3 of the contested Joint Action, like most of the other provisions of Title I of that act, fall within the scope of the CFSP. [90]

89 — Italics added. Note that the expression 'small arms' in the body of the contested Joint Action includes 'light weapons' (see point 9 above).

90 — See point 59 above.

201. It will also be recalled that the assistance given by the European Union pursuant to the contested decision concerns essentially the conversion of the ECOWAS moratorium on light weapons into a binding regional convention.

202. The moratorium in question, adopted by ECOWAS in October 1998, concerns the importation, exportation and manufacture of light weapons in Member States of ECOWAS. The preamble to the moratorium stresses that the proliferation of light weapons is a destabilising factor for the Member States of ECOWAS and a threat to the peace and security of their peoples. [91]

203. In supporting the conversion of that political initiative of ECOWAS into a binding regional convention, the contested decision thus gives its support, in accordance with Article 3 of the contested Joint Action, to the prevention of a new accumulation of small arms and light weapons in West Africa likely to destabilise (even further) that region.

204. The contested decision therefore aims, in a practical and direct way, to support the efforts of ECOWAS to combat the insecurity that would follow from a new accumulation of small arms and light weapons in West Africa. Consequently, the purpose of the contested decision appears to be mainly, if not exclusively, related to security.

205. It is true, I must agree, that security is a necessary condition of development. [92] However, contrary to what the Commission suggests, the mere statement in the first recital in the preamble to the contested decision that the excessive and uncontrolled accumulation and spread of small arms and light weapons reduces the prospects for sustainable development does not mean that the contested decision seeks to support a project that aims directly and/or mainly to improve the living conditions and/or social and economic conditions of the populations of the African States concerned.

206. On the contrary, the latter objective appears rather remote and, in any case, indirect and secondary by comparison with that

91 — Second recital of the Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa.

92 — As also noted at points I and III of the European Union Strategy to combat illicit accumulation and trafficking of small arms and light weapons and their ammunition, referring to the European Security Strategy adopted by the European Council in December 2003.

of preserving the regional security of the Member States of ECOWAS.

207. With regard to the content of the contested decision, it must be observed that it fixes a financial contribution and technical assistance amounting to EUR 515 000 for a term of 12 months to set up the Light Weapons Unit within the ECOWAS Technical Secretariat and to convert the ECOWAS moratorium on the importation, exportation and manufacture of small arms into a legally binding convention.

208. It is true that, as the Commission points out, a financial contribution and technical assistance are typical instruments used in the context of development aid.

209. However, that argument seems to me to disregard the fact that, to come within the scope of cooperation and aid for development, such instruments must aim precisely at development. In other words, the mere fact of having recourse to a financial instrument, such as aid, does not automatically mean that that aid falls within the Community competence for development cooperation, but it must also be classified as 'development aid'. In addition, there is nothing in the EU Treaty that forbids the use of a financial instrument or technical assistance in the context of Title V of the EU Treaty. Furthermore, the Commission itself admits this, and past decisions of the European Union provide numerous instances of it. [93]

210. Generally speaking, it seems to me that, in a situation where a decision lays down a financial contribution and technical assistance to a third State or, as in the present case, to a regional cooperation organisation, the examination of the content of the decision, unlike that of a measure of a legislative nature, is largely subordinated to the verification of the objective pursued by that decision.

211. In themselves, financial contributions and technical assistance are neutral and, in my view, it is only in the light of the aims they pursue that they can fall within the scope of development cooperation or of the CFSP.

212. As we have found, the purpose of the contested decision, in the light of the contested Joint Action, is, at least mainly, of a security nature. Moreover, the fact that, as the Commission submits, the contested decision makes a contribution to institutional strengthening, in particular by setting up a

93 — See the decisions cited in footnote 83 above,.

small arms unit in the ECOWAS Technical Secretariat, does not invalidate that assessment, since the strengthening of public administrations, whether national, regional or international, cannot constitute an end in itself but must, in order to fall within development cooperation, pursue a development objective. [94]

213. In those circumstances, the contested decision does not fall within the scope of development cooperation but pursues, at least principally, the objectives set out in Article 11(1) EU, in particular those of preserving peace and strengthening international security, objectives which, as the Commission concedes, do not correspond to any of the aims assigned to the Community. [95]

214. This assessment is not altered by the fact that, according to the Commission, it was envisaging assistance (at first sight) similar to that adopted by the contested decision. Apart from the fact that such an initiative does not alter the distribution of competences between the Community and the European Union, the documents cited by the Commission in support of its argument do not show that the Community undertook to finance a project identical or similar in content to that referred to by the contested decision.

215. It must be noted that the relevant passages of the regional cooperation strategy and the regional indicative programme for West Africa, signed on 19 February 2003 pursuant to the Cotonou Agreement by ECOWAS and the Commission, [96] cited by the latter in support of its argument, refer, first, in a merely descriptive way, to the importance of controlling the traffic in small arms in the region, where there is a moratorium on exportation and importation supported by the United Nations, [97] and, second, state that support 'may be given to back up the United Nations in carrying out priority measures … to place a moratorium on the import, export and production of small arms'. [98]

216. Regarding the last point, irrespective of the question of the distribution of competences between the Member States and the Community in relation to the financing of such projects, to envisage support for *carrying out* the moratorium cannot be

94 — See to that effect, point 63 of the Opinion of Advocate General Kokott in Case C-403/05, pending before the Court.

95 — See also point 159 above.

96 — Annex IV to the application. The arrangements for preparing and adopting cooperation strategies and indicative programmes are set out in Annex IV to the Cotonou Agreement. According to Article 10(2) of the annex, the regional indicative programmes will be adopted by common agreement between the Community and the ACP States concerned.

97 — Section 2.3., p. 26 of the document.

98 — Section 6.4.1., p. 47 of the document.

treated as support for the conversion of the moratorium into a legally binding convention.

217. However much, in the context of implementing the moratorium, measures can reasonably be envisaged which may pursue mainly objectives of human and socio-economic development such as support for local initiatives to promote awareness among the populations concerned of the excessive circulation of arms, contributing to projects aiming to deter the small-scale production of small arms and/or its replacement by the production of consumer goods, or even support for programmes for buying back weapons from local populations or the exchange of food for the surrender of small arms and light weapons, by contrast support for the conversion of a moratorium such as that of ECOWAS into a legally binding convention pursues, as already shown, at least mainly, an objective of strengthening regional and international security.

218. The conclusion reached in point 213 above is not contradicted either by Article 4(2) of the contested decision, which repeats almost word for word Article 9(1) of the contested Joint Action, and provides that 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' are to be submitted by the Presidency of the Union and the Commission. [99]

219. First, that finding appears to accord with the distribution of competences between the Union and the European Community in the field of combating the accumulation of small arms and light weapons, recognising that, as I concluded above, that sphere may fall within the scope of development cooperation in so far as the measures that are adopted or proposed have the main object of development cooperation, that is to say, they aim at the social and economic development of the populations concerned. Furthermore, it is in that sense that Article 7(2) of the contested Joint Action must be read, which states that '[t]he Council shall decide on the principle, arrangements and financing of such projects … *without prejudice* to Member States' bilateral contributions and *operation of the Community*', and also Article 8 which states, I repeat, that '[t]he Council *notes* that the Commission intends to direct its action towards achieving the objectives and the

99 — Italics added.

priorities of the [contested] Joint Action, *where appropriate by pertinent Community measures*'. [100]

220. Second, there is no doubt, contrary to what the Commission suggests, that the expressions 'European Union' and 'its development policies' in Article 4(2) of the contested decision and in Article 9(1) of the contested Joint Action do not designate the European Union acting in the context of Title V of the EU Treaty but, on the contrary, taking account also of the reference to the need to ensure 'the consistency of the Union's activities', constitute an explicit reference to the general obligation formulated in Article 3 EU which, being included in the common provisions of the EU Treaty and therefore addressed to the European Union as the 'facade' of the three pillars, requires it to ensure 'the consistency of its external activities *as a whole* in the context of *its* external relations, *security*, economic and *development* policies'. [101]

221. For all those reasons I consider that the contested decision could not have been adopted by the Community pursuant to Title XX of the EC Treaty. Furthermore, the contested Joint Action cannot be declared inapplicable in the present case, as it did not authorise the Council to adopt the contested decision in breach of Article 47 EU. Consequently, I propose that the Court dismiss the action.

V — Costs

222. 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 Council seeks an order for costs against the Commission and the Commission must, in my opinion, be unsuccessful, I consider that it must be ordered to pay the costs.

223. Under Article 69(4) of the Rules of Procedure, 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 Parliament must bear their own costs.

100 — Italics added.
101 — Italics added.

VI — Conclusion

224. I therefore propose that the Court rule as follows:

'(1) The action is dismissed.

(2) The Commission of the European Communities is ordered to pay the costs.

(3) 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 shall bear their own costs.'