

REVIEW OF COMPETENCE: SMALL ARMS CASE

Foreign and security policy is not an area where questions of competence – in the legal sense of the word - arise often. The Council acts by consensus, usually on proposals from the High Representative (since the entry into force of the Treaty of Lisbon), and the specific domains where the EU takes action (such as non-proliferation and disarmament policy) are normally well defined.

An exception to this came with a case brought by the Commission against the Council in 2005 (C-91/05, "ECOWAS") claiming that support for measures to prevent the proliferation of small arms in West Africa should be considered development policy rather than foreign policy, and that the Council therefore acted illegally and infringed on Community competences by adopting a decision on such support in the framework of the CFSP, whereas it should have been implemented through Community procedures by the Commission.

This was an ill judged action by the Commission. To many Member States it looked like an attempt by the Commission to increase its power relative to the Council; its main impact was to increase distrust between the institutions. The Court's judgment in favour of the Commission seemed to be based on an extraordinarily wide definition of development policy. By the time the judgment arrived the action had been completed and the case had no direct consequences, aside from the ill-feeling it created.

This action, however, took place under the old Treaties where the field of action for the CFSP was defined (by default) as areas not covered by Community competence. Where there was Community competence – as the Court decided was the case in this instance – that took precedence (under Article 47 of the old Treaty). The Court considered the earlier use of development funds for action on small arms as evidence that this was development policy and under Community competence.

In the new consolidated Treaty Article 47 has been replaced by Article 40. This article, instead of leaving the common foreign and security policy as a residual of areas not covered by other domains of EU external competence, puts the CFSP on an equal footing and states that actions outside the CFSP (e.g., development cooperation) shall not affect the latter. It appears likely therefore that further attempts

by the Commission to extend non-CFSP competence into areas normally covered by the rules and procedures of the CFSP would fail under the new Lisbon Treaty.