

JUDGMENT OF THE COURT

9 March 1994 *

In Case C-188/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for North Rhine-Westphalia, Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

TWD Textilwerke Deggendorf GmbH

and

Federal Republic of Germany, represented by the Federal Minister for Economic Affairs,

on the definitive nature of Commission Decision 86/509/EEC of 21 May 1986, on aid granted by the Federal Republic of Germany and the Land of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf (Official Journal 1986 L 300, p. 34), vis-à-vis the recipient of the aid to which it relates, after the

* Language of the case: German.

expiry of the time-limit prescribed by the third paragraph of Article 173 of the EEC Treaty for bringing an action, and on the validity of that decision,

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida and Díez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias (Rapporteur), F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- TWD Textilwerke Deggendorf GmbH, by Walter Forstner, Rechtsanwalt, Deggendorf, assisted by Professor Michael Schweitzer,
- the German Government, by Ernst Röder and Claus-Dieter Quassowski, respectively Ministerialrat and Regierungsdirektor at the Federal Ministry of Economic Affairs, acting as Agents,
- the French Government, by Philippe Pouzoulet and Jean-Louis Falconi, respectively Deputy Director and Secretary of Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agents,

— the Commission of the European Communities, by Antonino Abate, Principal Legal Adviser, and Claus Michael Happe, civil servant seconded to the Commission under the scheme for exchanging national civil servants, acting as Agents, assisted by Professor Meinhard Hilf, University of Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of TWD Textilwerke Deggendorf GmbH, represented by Karl-Heinz Schupp, Rechtsanwalt, Deggendorf, and of the Commission, represented by Antonino Abate, assisted by Bernd Langeheine, a member of the Legal Service, acting as Agents, at the hearing on 29 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1993,

gives the following

Judgment

1 By order of 18 March 1992, which was received at the Court on 12 May 1992, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for North Rhine-Westphalia, Federal Republic of Germany) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the definitive nature of Commission Decision 86/509/EEC of 21 May 1986, on aid granted by the Federal Republic of Germany and the Land of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf (Official Journal 1986 L 300, p. 34), vis-à-vis the recipient of the aid to which it relates, after the expiry of the time-limit prescribed by the third paragraph of Article 173 of the EEC Treaty for bringing an action, and on the validity of that decision.

2 Those questions were raised in the course of proceedings between the German undertaking TWD Textilwerke Deggendorf GmbH (hereinafter 'TWD') and the German Minister for Economic Affairs. From 1981 to 1983 that undertaking, a manufacturer of polyamide and polyester yarn, received from the Federal Republic of Germany, under the regional aid programme run jointly by the Federal Government and the *Länder* and under the Bavarian regional aid programme, aid including a subsidy of DM 6.12 million. That subsidy was granted on the basis of certificates issued by decisions of the Federal Minister for Economic Affairs taken pursuant to Article 2 of the German Law on Investment Grants.

3 In 1985 the Commission, not having been notified by the Federal Republic of Germany of any of those measures, initiated the procedure under the first paragraph of Article 93 (2) of the EEC Treaty, as a result of which it adopted the abovementioned Decision 86/509. By that decision, addressed to the Federal Republic of Germany, the Commission declared that the aid granted to a producer of polyamide and polyester yarn situated in Deggendorf — which was in fact TWD — had been granted in contravention of Article 93 (3) of the Treaty and was consequently unlawful. It declared that that aid was also incompatible with the common market by virtue of Article 92 of the EEC Treaty. It accordingly requested the Federal Republic of Germany to recover the aid.

4 By letter of 1 September 1986 the Federal Minister for Economic Affairs forwarded to TWD for information a copy of Decision 86/509 and pointed out that it could bring an action against that decision under Article 173 of the Treaty. Neither the Federal Republic of Germany nor TWD challenged the decision before the Court of Justice.

5 By decision of 19 March 1987 the Federal Minister for Economic Affairs revoked the certificates issued under Article 2 of the Law on Investment Grants, which

were the legal basis of the Federal aid, on the ground that they were unlawful and were to be returned in accordance with the decision of the Commission.

- 6 On 16 April 1987 TWD appealed against that decision to the Verwaltungsgericht (Administrative Court) Cologne, which dismissed its application by judgment of 21 December 1989.

- 7 TWD appealed against that judgment to the Oberverwaltungsgericht für das Land Nordrhein-Westfalen on 21 February 1990. It argued in particular that the investment grants obtained from 1981 to 1983 were partially compatible with the common market so that Commission Decision 86/509 was at least partially unlawful. In the view of TWD, the unlawfulness of the decision could be pleaded even after the expiry of the time-limit laid down in the third paragraph of Article 173 of the Treaty.

- 8 It is in that context that the national court referred the following questions to the Court:
 - '1. Is a national court bound by a decision of the EEC Commission adopted pursuant to Article 93 (2) of the EEC Treaty when hearing an appeal regarding the implementation of that decision by the national authorities brought by the recipient of the aid and addressee of the implementation measures on the ground that the decision of the EEC Commission is unlawful in circumstances where the recipient of the aid did not institute proceedings under the second paragraph of Article 173 of the EEC Treaty, or did not do so in good time, even though it was informed of the Commission's decision in writing by the Member State?

2. In the event that the answer to Question 1 is in the negative:

Is Commission Decision 86/509/EEC of 21 May 1986 (Official Journal L 300, p. 34) entirely or partly invalid because, contrary to the view of the Commission, the aid granted is entirely or partially compatible with the common market?'

9 In its order for reference the national court notes that the question whether the application before it is well founded depends on the validity of the abovementioned decision of the Commission but that the question of validity arises only if the national court were able to consider the unlawfulness of the decision, notwithstanding the expiry of the time-limit laid down in the third paragraph of Article 173 of the Treaty. The second question is therefore submitted only in the event that the first question, which is preliminary in nature, is answered in the negative.

The first question

10 The issue before the national court is whether or not, in the factual and legal circumstances of the main proceedings, the applicant is time-barred from pleading the unlawfulness of the Commission's decision in support of an action brought against the administrative act by which the national authority, in implementation of the Commission's decision, revoked the certificates which formed the legal basis for the aid which it had received.

11 The national court emphasizes that the Commission's decision was not challenged by the applicant in the main proceedings, the recipient of the aid with which the decision was concerned, although a copy of that decision had been sent to it by the

Federal Ministry of Economic Affairs and that Ministry had explicitly informed it that it could bring an action against that decision before the Court of Justice.

- 12 The question submitted to the Court must be answered in the light of those circumstances.
- 13 It is settled law that a decision which has not been challenged by the addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him (see in the first place the judgment in Case 20/65 *Collotti v Court of Justice* [1965] ECR 847).
- 14 The undertaking in receipt of individual aid which is the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty has the right to bring an action for annulment under the second paragraph of Article 173 of the Treaty even if the decision is addressed to a Member State (judgment in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671). By virtue of the third paragraph of that article, the expiry of the time-limit laid down in that provision has the same time-barring effect vis-à-vis such an undertaking as it does vis-à-vis the Member State which is the addressee of the decision.
- 15 It is settled law that a Member State may no longer call in question the validity of a decision addressed to it on the basis of Article 93 (2) of the Treaty once the time-limit laid down in the third paragraph of Article 173 of the Treaty has expired (see the judgments in Case 156/77 *Commission v Belgium* [1978] ECR 1881 and Case C-183/91 *Commission v Greece* [1993] ECR I-3131).

- 16 That case-law, according to which it is impossible for a Member State which is the addressee of a decision taken under the first paragraph of Article 93 (2) of the Treaty to call in question the validity of the decision in the proceedings for non-compliance provided for in the second paragraph of that provision, is based in particular on the consideration that the periods within which applications must be lodged are intended to safeguard legal certainty by preventing Community measures which involve legal effects from being called in question indefinitely.
- 17 It follows from the same requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision.
- 18 To accept that in such circumstances the person concerned could challenge the implementation of the decision in proceedings before the national court on the ground that the decision was unlawful would in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired.
- 19 It is true that in its judgment in Joined Cases 133 to 136/85 *Rau v BALM* [1987] ECR 2289, on which the French Government relies in its observations, the Court held that the possibility of bringing a direct action under the second paragraph of Article 173 of the EEC Treaty against a decision adopted by a Community institution did not preclude the possibility of bringing an action in a national court against a measure adopted by a national authority for the implementation of that decision, on the ground that the latter decision was unlawful.

20 However, as is clear from the Report for the Hearing in those cases, each of the plaintiffs in the main proceedings had brought an action before the Court of Justice for the annulment of the decision in question. The Court did not therefore rule, and did not have to rule, in that judgment on the time-barring effects of the expiry of time-limits. It is precisely that issue with which the question referred by the national court in this case is concerned.

21 This case is also distinguishable from Case 216/82 *Universität Hamburg v Hauptzollamt Hamburg-Kebrwieder* [1983] ECR 2771.

22 In the judgment in that case the Court held that a plaintiff whose application for duty-free admission had been rejected by a decision of a national authority taken on the basis of a decision of the Commission addressed to all the Member States had to be able to plead, in proceedings brought under national law against the rejection of his application, the illegality of the Commission's decision on which the national decision adopted in his regard was based.

23 In that judgment the Court took into account the fact that the rejection of the application by the national authority was the only measure directly addressed to the person concerned of which it had necessarily been informed in good time and which it could challenge in the courts without encountering any difficulty in demonstrating its interest in bringing proceedings. It held that in those circumstances the possibility of pleading the unlawfulness of the Commission's decision derived from a general principle of law which found its expression in Article 184 of the EEC Treaty, namely the principle which confers upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if

that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see the judgment in Case 92/78 *Simmenthal v Commission* [1979] ECR 777).

24 In the present case, it is common ground that the applicant in the main proceedings was fully aware of the Commission's decision and of the fact that it could without any doubt have challenged it under Article 173 of the Treaty.

25 It follows from the foregoing that, in factual and legal circumstances such as those of the main proceedings in this case, the definitive nature of the decision taken by the Commission pursuant to Article 93 of the Treaty vis-à-vis the undertaking in receipt of the aid binds the national court by virtue of the principle of legal certainty.

26 The reply to be given to the first question must therefore be that the national court is bound by a Commission decision adopted under Article 93 (2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty, or did not do so within the period prescribed.

The second question

- 27 Since the second question was submitted by the national court only in the event that the first question is answered in the negative, there is no need to reply to it.

Costs

- 28 The costs incurred by the German and the French Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, by order of 18 March 1992, hereby rules:

The national court is bound by a Commission decision adopted under Article 93 (2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads

the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty, or did not do so within the period prescribed.

Due	Moitinho de Almeida	Díez de Velasco	Kakouris
Joliet	Schockweiler		Rodríguez Iglesias
Grévisse	Zuleeg	Kapteyn	Murray

Delivered in open court in Luxembourg on 9 March 1994.

R. Grass

O. Due

Registrar

President