OPINION OF ADVOCATE GENERAL JACOBS
delivered on 15 September 1993 *

My Lords,

1. This case raises an important question of principle concerning the system of remedies established by the EEC Treaty: namely, whether a recipient of State aid which the Commission has declared unlawful may, when called upon by the national authorities to repay the aid in accordance with the Commission's decision, challenge the validity of that decision before the national courts, and before the Court of Justice on a reference from the national court under Article 177 of the Treaty, even though it failed to challenge the Commission's decision in the Court of Justice directly under Article 173 of the Treaty.

2. The applicant in the main proceedings, TWD Textilwerke Deggendorf GmbH (hereafter 'TWD'), manufactures various synthetic fibres in Germany and elsewhere. In 1983 and 1984 it received investment grants totalling DM 6.12 million from the German Ministry of Economic Affairs. It also received from the Bavarian authorities a loan of DM 11 million at an interest rate of 5%. These matters subsequently came to the attention of the Commission, which commenced the procedure laid down in the first subparagraph of Article 93 (2) of the Treaty. On 21 May 1986 the Commission adopted Decision 86/509/EEC 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, [1] Article 1 of which declared that the aid was (a) unlawful on the ground that it had not been notified to the Commission under Article 93 (3) of the Treaty and (b) incompatible with the common market. Article 2 of the decision required the German authorities to recover the aid and to inform the Commission within two months of the steps that it had taken for that purpose.

3. The decision was addressed solely to the Federal Republic of Germany and does not mention TWD by name; it refers instead to 'a producer of polyamide and polyester yarn

* Original language: English.

1 — OJ 1986 L 300, p. 34.

situated in Deggendorf'. However, the identity of that producer was never in doubt and by a letter dated 1 September 1986 the Federal Ministry of Economic Affairs informed TWD of Commission Decision 86/509. That letter stated that the Ministry had concluded that the prospects of successfully challenging the decision under Article 173 of the Treaty were slight and then pointed out that such a challenge might in certain circumstances be mounted by natural and legal persons. The letter set out in full the text of Article 173. No proceedings were commenced under Article 173, either by the German Government or by TWD.

4. By decision of 19 March 1987 the Federal Minister for Economic Affairs revoked the certificates on the basis of which aid had been granted to TWD. The effect of that revocation is to oblige TWD to repay the aid. On 16 April 1987 TWD commenced proceedings for the annulment of the Federal Minister's decision of 19 March 1987. After its application had been dismissed by the Verwaltungsgericht Köln, it appealed to the Oberverwaltungsgericht für das Land Nordrhein-Westfalen. That court took the view that the question whether TWD's action was well founded depended on the validity of Commission Decision 86/509, but entertained some doubt as to whether TWD was entitled to question the validity of that decision before the national courts since it had failed to challenge the decision under Article 173 of the Treaty within the prescribed period of two months. The Oberverwaltungsgericht therefore referred the following questions to the Court of Justice:

'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 entirely or partially invalid because, contrary to the view of the Commission, the aid granted is entirely or partially compatible with the common market?'

5. Written observations have been submitted by TWD, the Commission and the German and French Governments. All except TWD have confined their observations to Question (1) and the Court has likewise decided to deal only with that question at this stage of the proceedings. TWD and the French Government contend that a natural or legal person who could have challenged a decision under Article 173 but did not do so is not precluded from questioning the validity of the decision in subsequent proceedings before the national courts. The Commission and the German Government take the opposite view. However, the Commission observes that, notwithstanding the definitive nature of a decision that has not been challenged within the time limit, the recipient of State aid may in exceptional circumstances be able to invoke a legitimate expectation that the aid was lawful.

6. The essential argument advanced by TWD and the French Government is that the remedies established by Articles 173 and 177 of the Treaty are autonomous, each being subject to its own conditions of admissibility. Failure to mount a direct challenge against a Commission decision under Article 173 does not therefore preclude a party from mounting an indirect challenge in the national courts and, by way of Article 177, in the Court of Justice. TWD contends that, if it were otherwise, the paradoxical result would be that a person who was directly and individually concerned by a decision would be forced to use the more difficult and more costly remedy established by Article 173, which is moreover subject to a two-month time limit, whereas a person who was not directly and individually concerned by a decision would be able to pursue a simpler and less costly remedy under Article 177, which is not subject to any time limit.

7. Both TWD and the French Government cite the Court's judgment in *Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder*. [2] In that case the importer of a scientific instrument challenged a national customs authority's decision refusing to admit the instrument duty-free. That decision was based on a Commission decision which had been addressed to the Member States and which declared that the conditions for duty-free importation were not satisfied because an instrument of equivalent scientific value was manufactured within the Community. The Court ruled that the importer, having failed to contest the Commission's decision under Article 173 of the Treaty, was not precluded from challenging its validity in proceedings before the national courts, which were therefore free to refer the question of the decision's validity to the Court of Justice for a preliminary ruling. The Court observed that the national court's power to refer the validity of a Commission decision to the Court of Justice corresponded to a general principle of law which had found expression in Article 184 of the Treaty.

2 — Case 216/82 [1983] ECR 2771.

8. The Commission's view is based partly on the principle of legal certainty, which requires that once a decision has become definitive upon the expiry of the limitation period laid down in Article 173 its validity may no longer be called in question, and partly on the need to ensure the coherence of the system of remedies established by the Treaty. The Commission contends that the appropriate remedy for challenging the decision in question was a direct action under Article 173. TWD was informed by the German Government not only of the Commission's decision but also of the possibility of an action under Article 173. It could undoubtedly have brought such an action, since it was directly and individually concerned by the decision, and having failed to do so within the limitation period of two months it is now precluded from challenging the decision, which has become definitive.

9. The Commission relies heavily on the Court's judgment in *Commission* v *Belgium*. [3] In that case the Commission applied for a declaration that Belgium was in breach of the Treaty as a result of its failure to comply with a Commission decision requiring it to terminate a scheme of State aid for the Belgian railways. In its defence Belgium attempted to contest the validity of the decision requiring it to terminate the aid. The Court held that, since Belgium had failed to challenge the decision under Article 173 within the prescribed limitation period, it was barred from calling in question its validity in subsequent proceedings brought under the second subparagraph of Article 93 (2) of the Treaty. The Court based its decision partly on 'the fact 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'.

10. The German Government, whose point of view is broadly analogous to that of the Commission, also invokes the principle of legal certainty and argues that it is important for the competitors of the recipient of aid to be able to establish with certainty whether the aid is compatible with the common market.

11. My opinion on the fundamental issue raised by this case is as follows.

12. It may be noted in the first place that the issue does not appear to be resolved by the Court's existing case-law. None of the cases cited is exactly analogous to the present one. The *Universität Hamburg* case differs inasmuch as the decision at issue in that case was addressed to all the Member States and was of a general nature: it was intended to apply

3 — Case 156/77 [1978] ECR 1881.

to all importations of the type of scientific instrument in question, not just to the importation effected by Hamburg University. The decision at issue in the present case was addressed to a single Member State and was concerned exclusively with aid granted to a single undertaking. On the other hand, the judgment in *Commission* v *Belgium* also has no direct bearing on the present case. There the Court held that a Member State which fails to contest a decision addressed to it within the prescribed time limit cannot question the validity of that decision when the Commission seeks a declaration that the Member State has failed to fulfil its obligations by not implementing the decision. That does not necessarily mean that an undertaking affected by such a decision, of which it is not an addressee, is in the same situation if it fails to contest the decision directly within the time limit.

13. The basic principle must be that Articles 173 and 177 provide for autonomous remedies each of which is subject to its own conditions of admissibility. Obviously there must be some exceptions to that principle: for example, the addressee of an individual decision who fails to challenge it directly within the limitation period should not be able to challenge it indirectly when steps are taken to enforce it in the national courts. If the addressee of an individual decision were allowed to challenge it in the national courts, the two-month limitation period laid down in the third paragraph of Article 173 would be deprived of any significance. Moreover, Article 173 provides the more appropriate procedure for challenging such a measure, for reasons which I shall set out below (paragraphs 20 to 22).

14. At the other extreme, an individual who is adversely affected by a general measure, such as a regulation, but who might have difficulty in establishing that he is directly and individually concerned by the measure, as required by the second paragraph of Article 173, should not be prevented from challenging the measure indirectly on the ground that he did not mount a direct challenge which might easily have been declared inadmissible. As regards regulations, that is clear from the wording of Article 184, which provides:

'Notwithstanding the expiry of the period laid down in the third paragraph of Article 173, any party may, in proceedings in which a regulation of the Council or of the Commission is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation.'

However, it is clear from *Universität Hamburg*, among other cases, that the principle embodied in Article 184 is not confined to regulations but is equally applicable to decisions, if there is a genuine doubt as to whether the individual concerned had *locus standi* to challenge the decision under Article 173. The Court's judgment in *Simmenthal* v

Commission [4] suggests that Article 184 may be invoked only against normative measures which natural and legal persons would not be able to attack under Article 173.

15. The present case is situated somewhere between the two extremes described above. On the one hand, it differs from the type of case in which an individual measure is challenged by the person to whom it was addressed. Since the decision at issue in these proceedings was not addressed to TWD, that undertaking did not have an automatic right of action under Article 173 but would have been required to satisfy the test of direct and individual concern. On the other hand, the present case differs in many respects from the type of case in which a general measure, such as a regulation, is challenged by a natural or legal person. The measure in question is not of a general nature but is individual. It is concerned solely with the aid granted to TWD by the German authorities in 1983 and 1984. Although TWD is not referred to by name in the decision, it is clearly identified by the terms of the decision. TWD is the only undertaking directly affected by the decision and it is so affected not by virtue of its membership of a category of undertakings but by virtue of its status as the sole recipient of the aid which must, according to the decision, be recovered. In the circumstances there cannot be any doubt that TWD would have been able to satisfy the requirement of direct and individual concern under the second paragraph of Article 173. The Court has indeed expressly recognized that the recipient of aid is directly and individually concerned by a Commission decision declaring the aid incompatible with the common market. [5]

16. In my view, the present type of case should be treated as analogous to a case in which an individual measure is contested by the person to whom it is addressed, with the result that the failure to mount a direct challenge under Article 173 precludes an indirect challenge under Article 177. The reasons which justify not allowing the addressee of an individual measure to challenge it indirectly under Article 177, when he has failed to challenge it directly under Article 173, apply with equal force to the present type of case.

17. An action under the second paragraph of Article 173 is clearly the appropriate remedy for a challenge to the validity of an individual decision by a natural or legal person who is an addressee of the decision or is directly and individually concerned by it. That is apparent from the wording of the provision.

4 — Case 92/78 [1979] ECR 777, at paragraphs 39 and 40; see also Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, at paragraph 23.

5 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at paragraph 5; see also the Opinion of Advocate General Darmon in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, at p. 913.

Such an action should be brought within a special limitation period of two months laid down in the third paragraph of Article 173. Failure to commence proceedings within that period extinguishes the right of action. [6] That limitation period would be deprived of all sense and purpose if a person who undoubtedly has *locus standi* to challenge a decision under Article 173 could simply ignore the decision and contest its validity in subsequent proceedings brought to enforce the decision.

18. The purpose of the short limitation period under Article 173 is to promote legal certainty. [7] Once the limitation period has expired the decision becomes definitive and is in principle no longer open to challenge. As the German Government has pointed out, there are good reasons for desiring legal certainty in the context of State aid: competitors of the recipient of aid have an interest in knowing whether the aid will be revoked, since it may influence their own investment decisions. Legal certainty is not of course an absolute requirement, as is proved by the possibility that normative acts may be declared invalid many years after their adoption. But that is a necessary consequence of the limited *locus standi* for individuals to challenge normative acts directly, in conjunction with the principle that any measure which produces binding legal effects must be amenable to some form of challenge by persons who are adversely affected by it. That does not justify derogating from the principle of legal certainty in favour of persons who undoubtedly had *locus standi* to contest an individual measure directly but omitted to do so.

19. Nor is there any particular policy consideration that militates in favour of allowing an undertaking in TWD's position to have a second opportunity to challenge a decision that it has failed to contest under Article 173. There is no compelling reason to look favourably on persons who fail to make use of the remedy available to them within the prescribed time-limit. On the contrary, the maxim *vigilantibus non dormientibus subveniunt jura* should be applied. As regards TWD's argument about the paradox of providing a simple and cheap remedy, not subject to a time limit, for persons who are not directly and individually concerned by a measure, while those who are so concerned have a less satisfactory remedy, it is in fact questionable whether an indirect challenge under Article 177 is simpler and cheaper than a direct action under Article 173. If there is a paradox, it seems to me that such paradoxes are inevitable in any reasonably complete system of remedies.

20. Greater damage to the coherence of the system of remedies would be done if an undertaking were allowed to challenge indirectly, under Article 177, a decision against which the appropriate remedy is clearly a direct action under Article 173. Although Articles 173 and 177 may lead to essentially the same result, namely a declaration that a

6 — See, for example, Case 20/65 *Collotti* v *Court of Justice* [1965] ECR 847, at p. 850.

7 — See *Commission* v *Belgium* (cited in note 3), at paragraph 21.

measure is invalid, there are important differences between those two forms of procedure. [8] A direct action under Article 173, which involves a full exchange of pleadings, as opposed to a single round of observations, is in general more appropriate for determining issues of fact than reference proceedings under Article 177, in which the Court's task is essentially to rule on questions of law. But the validity of an individual decision, in particular a decision declaring State aid incompatible with the common market, will often depend on issues of fact, sometimes complex issues involving the appraisal of economic data. It is manifestly desirable that such issues should be determined under the procedure best suited to resolving them.

21. At the hearing the Commission drew attention to another procedural difference between a direct action and a reference for a preliminary ruling. Where a direct action is brought, competitors of the recipient of the aid are informed of the existence of the action by means of a notice published in the Official Journal and may, if able to establish a sufficient interest, intervene in accordance with Article 37 of the Statute of the Court. In reference proceedings competitors cannot submit observations under Article 20 of the Statute unless they are able to intervene in the action before the national court, which may be difficult, especially for a competitor in another Member State, who is unlikely to know of the existence of the action. In my opinion, that is a further reason for regarding a direct action under Article 173 as the appropriate procedure for challenging the type of decision in issue.

22. The argument based on the need to preserve the coherence of the system of remedies is strengthened by the establishment of the Court of First Instance, which was created for the specific purpose of reviewing individual decisions in proceedings initiated by natural and legal persons and which does not of course have jurisdiction to deliver preliminary rulings. If a decision which should in principle be reviewable in the Court of First Instance could be challenged in the national courts and in the Court of Justice under Article 177, that would have the effect of removing the proceedings from the competent court.

23. That argument is now further strengthened by the recent extension in the jurisdiction of the Court of First Instance, which took effect on 1 August 1993. [9] Although that decision cannot have any direct bearing on this case, since it was adopted after these proceedings were commenced, it may none the less be noted that natural and legal persons who wish to challenge Commission

8 — On this subject see my Opinion in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, at paragraphs 71 to 74.

9 — Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993, OJ 1993 L 144, p. 21.

decisions in relation to State aid must now do so in the Court of First Instance. Thus in the field of State aid different courts have jurisdiction depending on whether the proceedings arise under Article 173 or Article 177. For the future therefore it would be even more inappropriate if Article 177 were available as an alternative to Article 173 in this type of case.

24. None of the above arguments would be decisive if TWD had been prevented from challenging the decision because the limitation period had expired before it knew of the decision's existence. It is clear that in the circumstances of the present case there has been no such denial of justice. TWD was informed of the decision by the German Government in a letter dated 1 September 1986 (i. e. several weeks before the decision was published in the Official Journal, which did not take place until 24 October 1986). It is not therefore necessary to consider the difficult question whether the limitation period under Article 173 would have been set in motion by the publication of the decision in the Official Journal on 24 October 1986, even if TWD had not been expressly informed of it until a later date. What matters is that TWD had actual knowledge of the decision and failed to take the necessary steps to initiate the appropriate procedure for challenging it.

25. The author of a paper devoted to the question of principle raised by the present case has suggested, [10] in addition to arguments which I have already examined, two further arguments in favour of allowing a person who could have challenged directly a decision addressed to another person to challenge the decision indirectly in the national courts and in the Court of Justice under Article 177. It is argued first that the power to refer a question regarding the validity of a decision is the prerogative of the national court and that only the national court's doubts about validity — not those of a private party — are relevant. Thus the failure of the undertaking concerned to challenge the decision directly cannot divest the national court of its power to refer the question of validity to the Court of Justice. In my view, that argument disregards the definitive character of an individual decision which has not been challenged under the appropriate procedure within the relevant time limit by any of the persons who had *locus standi* for such an action. It also disregards the fact that a direct action under Article 173 is the proper remedy for contesting an individual decision that has no normative effects. It would be wrong to impair the coherence of the system of remedies for the sake of preserving the supposedly unfettered power of national courts to question the validity of any decision adopted by a Community institution. Clearly, there are certain decisions that may only be contested in a direct action under Article 173.

26. The other argument is that, if it is accepted that certain decisions cannot be

10 — Gerhard Bebr, *Direct and indirect judicial control of Community acts in practice: the relation between Articles 173 and 177 of the EEC Treaty*, in *The Art of Governance*, Festschrift in honour of Eric Stein, 1987, at p. 91.

challenged in the national courts even by persons to whom they were not addressed, on the ground that they can only be contested in a direct action under Article 173, national courts will have to determine whether the person in question was directly and individually concerned by a decision before they will know whether they have jurisdiction to examine the decision's validity and refer the matter to the Court of Justice. Thus national courts will have to resolve a complex preliminary issue (namely, that of *locus standi* under Article 173) before they can decide whether to seek a preliminary ruling on the substantive issue of the decision's validity. The answer to that objection is that there is no such difficulty in a case like the present one, where TWD's *locus standi* under Article 173 cannot have been in any doubt. In my view, it is only in situations where *locus standi* under Article 173 is clear beyond doubt that the availability of a direct action under that provision should preclude a natural or legal person from challenging indirectly a decision addressed to another person. If that approach is adopted, there will be no complex preliminary issue of *locus standi* under Article 173 for the national court to resolve. Such an approach is further commended by the consideration that the rights of individuals should not be prejudiced as a result of uncertainty in the law. It is, moreover, consistent with both *Commission* v *Belgium* and *Universität Hamburg*.

27. A final point, which I mention only because of the weight attached to it by the Commission, is the latter's suggestion that the Court should allude in its ruling to the possibility that national courts may refer to the Court of Justice questions of interpretation concerning the exceptional circumstances in which a recipient of aid may invoke the principle of legitimate expectation in proceedings to recover the aid. In my opinion, it would not be appropriate for the Court to deal expressly with that issue, which has not been raised by the Oberverwaltungsgericht and which is not in any event concerned with the validity of the Commission's decision. If the national court subsequently decides that it wishes to refer such a question to the Court, it will of course be free to do so.

Conclusion

28. Accordingly, I am of the opinion that the Court should reply to the questions submitted by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen as follows:

Where the Commission has addressed a decision to a Member State under the first subparagraph of Article 93 (2) of the EEC Treaty requiring the recovery of aid

unlawfully granted to an undertaking by that Member State, and where the undertaking concerned has failed to exercise its right to challenge that decision under Article 173 of the Treaty within the applicable time limit, the validity of the decision may not be called in question in proceedings before the national courts in which the undertaking opposes steps taken by the Member State to recover the aid.