JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
28 October 1993 *

In Case T-83/92,

Zunis Holding SA, a company incorporated under Luxembourg law and having its registered office in Luxembourg,

Finan Srl, a company incorporated under Italian law and having its registered office in Bergamo (Italy) and

Massinvest SA, a company incorporated under Swiss law and having its registered office in Mendrisio (Switzerland),

represented by Nicholas Forwood QC, of the Bar of England and Wales, and Stanley Crossick, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

applicants,

v

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, and Bernd Langeheine, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision allegedly contained in the Commission's letter of 31 July 1992 to the applicants refusing to reopen its investigation in Case IV/M.159 (Mediobanca/Generali),

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, J. Biancarelli, C. P. Briët and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 June 1993,

gives the following

Judgment

The factual background to the proceedings

1 On 27 November 1991 the Commission received notification, under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version published in OJ 1990 L 257, p. 14) ('Regulation No 4064/89'), of an operation by which Mediobanca — Banca di Credito Finanziario SpA ('Mediobanca') had increased its shareholding in Assicurazioni Generali SpA ('Generali') from 5.98% to 12.84%.

2 By a decision of 19 December 1991, adopted pursuant to Article 6(1)(a) of Regulation No 4064/89, the Commission concluded that the notified operation did not fall within the scope of that regulation on the ground that Mediobanca would not, following that concentration, be in a position to exercise, by itself or together with others, a 'decisive influence' on Generali.

3 In a letter of 26 June 1992 addressed to the Commission the applicants, all of whom are shareholders in Generali, requested the reopening of the proceedings following the publication on 19 March 1992 in the Italian daily newspaper *Il Sole 24 Ore* of an article reproducing the full text of a previously secret agreement signed in Paris on 26 June 1985 between Mediobanca, Lazard Frères de Paris ('Lazard') (whose subsidiary Euralux SA was the second largest shareholder in Generali with 4.77% of the share capital) and Generali itself ('the agreement'). That agreement provides, *inter alia*, for the creation of a steering committee composed of representatives of Generali and its two main shareholders with a view to examining Generali's problems which were of common interest and influencing the appointment of certain members of the company's administrative and senior management bodies.

4 In reply to a written question put by the Court, the applicants stated that they became aware of that article 'at the end of March or beginning of April 1992' and that they had their first informal contact with the Commission on 6 May 1992, prior to the formal request by letter of 26 June 1992 that the proceedings be reopened.

5 In that request, the applicants claimed essentially that the Commission's conclusion in its decision of 19 December 1991 that the notified operation did not fall within the scope of Regulation No 4064/89 resulted from a fundamental misapprehension as to the essential facts concerning the extent of the influence and control exercised by Mediobanca, both by itself and in conjunction with Lazard, prior to the increase in its shareholding by the notified operation. In the view of the applicants, such a misapprehension could be attributable only to manifestly incomplete or incorrect information regarding the terms of the agreement concluded between Mediobanca, Lazard and Generali and in particular regarding its effects. The applicants claimed further that the existence of a notification which was incomplete and incorrect had the procedural consequence that the Commission remained competent to reopen the case and that this would be justified both in the public interest and in that of the parties concerned.

6 In a letter of 31 July 1992, signed by the Commission's Director-General for Competition, the latter rejected the applicants' request that the procedure be reopened, on the ground, *inter alia*, that:

'... the Mediobanca/Generali decision was not based on "incorrect information", as you alleged, since the Commission knew of the 1985 Paris agreement and took it into account when making its decision. I refer to Commission's statement that "Il predetto accordo non contiene disposizioni circa l'esercizio congiunto dei diritti di voto né include qualsivoglia meccanismo societraio che garantisca il risultato finale delle proposizioni concernenti la composizione degli organi sociali" [the aforementioned agreement does not include any provisions concerning the joint use of voting rights nor any company mechanism guaranteeing the final result of the propositions concerning the composition of the company's bodies] (Par. 9(2) of the decision).

It follows that there exist no grounds to reopen the examination of the case and, consequently, there is no need to take any decision concerning the suspension of the operation.'

Procedure and forms of order sought by the parties

7 It was in those circumstances that the applicants, by application lodged at the Registry of the Court of First Instance on 30 September 1992, brought an action seeking the annulment of the decision alleged to be contained in the above letter.

8 By a document lodged at the Registry of the Court of First Instance on 17 December 1992, the Commission raised an objection of inadmissibility against the action brought by the applicants in accordance with Article 114 of the Rules of Procedure.

9 The applicants claim that the Court should:

— order the Commission, as measures of inquiry, to produce the full text of the decision of 19 December 1991 and the formal notification by Generali/Mediobanca, along with all other documents relating to the agreement and its effects;

— declare the Commission's decision as notified in the letter of 31 July 1992 to be void;

— order the Commission to pay the costs.

10 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— order the applicants to pay jointly and severally the costs of the proceedings.

11 In their observations on the objection of inadmissibility raised by the Commission, the applicants claim that the Court should:

— reject the Commission's objection as unfounded and declare the application admissible; alternatively

— join the issue of admissibility to the substance of the case, and adopt all necessary measures of inquiry as to the true nature of the letter of 31 July 1992;

— order the Commission to pay all costs.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to accede to the Commission's request that it rule on the objection of inadmissibility without hearing argument on the substance of the case. At the same time, it requested the parties to reply to a number of written

questions. The applicants and the Commission replied to the Court's questions by documents lodged on 14 June 1993. The parties presented oral argument and replied to questions put to them by the Court at the hearing on 24 June 1993.

13 At the conclusion of the hearing, the President declared the oral procedure regarding the objection of inadmissibility closed.

The admissibility of the application for annulment

The arguments of the parties

14 In support of the objection of inadmissibility which it has raised, the Commission argues in the first place that the letter of 31 July 1992 does not constitute a decision amenable to judicial review since it simply informs the applicants that the Commission, when taking its decision, was aware of the agreement and took it into account. It points out in that regard that while it is not legally impossible for it to reopen the investigation into a merger operation which has led to a decision under Article 6(1)(a) of Regulation No 4064/89, there is no provision of Community law which would oblige it to reopen such an investigation at the request of an undertaking concerned, and certainly not at the request of a third party relying on what is alleged to be a new fact. The Commission also takes the view that it must be careful when exercising its discretionary powers with regard to the reopening of cases in this field in view of the principle of the protection of legitimate expectations and the difficulty in undoing the consequences of a concentration.

15 The Commission draws a parallel in this regard with the rules governing applications for revision of a judgment of the Court of Justice or Court of First Instance and takes the view that a request for review of a decision adopted under Regulation No 4064/89 would be 'valid' only after discovery of a fact which, prior to the adoption of the decision, was unknown to the Commission and to the party requesting the review. According to the Commission, the applicants have failed to put forward any new fact and do not claim that the agreement constituted a fact which was unknown to the Commission when it took its decision of 19 December

1991, limiting themselves instead to the contention that the Commission did not properly assess the effects of that agreement.

16 In its objection of inadmissibility, the Commission also argues that the letter of 31 July 1992 does not embody a decision and that it follows from its wording and spirit that it was situated within a preliminary stage of the examination of the applicants' request and expressed no more than a first reaction of the Commission's services which was thus devoid of legal effect. The Commission also contends that a definitive refusal to reopen the proceedings would have had to be adopted by the same body as that which was competent for a reopening of a merger case, that is to say, the Commission acting as a collegiate body. At the hearing, however, the Commission stated that it did not wish to pursue that argument.

17 Secondly, the Commission considers that in any event the letter of 31 July 1992 could not be construed as an act of direct and individual concern to the applicants and that they consequently lacked *locus standi* to challenge that letter in the same way as they also lacked *locus standi* to challenge the decision of 19 December 1991 or to request a reopening of the investigation which led to that decision. The Commission argues in this connection that, without prejudice to the general question whether and when minority shareholders might be directly and individually affected by decisions taken under Regulation No 4064/89, this was not the case with regard to the applicants in the present proceedings. Furthermore, it notes that they did not submit any observations or otherwise participate in the administrative proceedings which led to the decision of 19 December 1991.

18 Finally, the Commission contends, in the alternative, that the letter of 31 July 1992 is not amenable to separate judicial review as it merely confirms the earlier decision. That letter, in the opinion of the Commission, simply repeated the statement that nothing in the agreement had the effect of giving Mediobanca control of Generali, either alone or with others, and merely quoted the relevant passage from the decision of 19 December 1991. The Commission takes the view that the applicants' action is in reality an inadmissible attempt to challenge the earlier decision long after the expiry of the time-limit laid down in the third paragraph of Article 173 of the EEC Treaty.

19 In their application, the applicants begin by pointing out that the Commission, in its letter of 31 July 1992, did not dispute their *locus standi* to seek a reopening of the proceedings and thereby implicitly accepted that, if its decision were based on incorrect information provided by the notifying parties, it would have sufficient grounds to reopen the examination of the case.

20 The applicants point out first in that regard that the facts which led to the present proceedings have their origin in an increase in Generali's share capital in July 1991, the unusual structure of which allowed Mediobanca to acquire control of approximately 50 000 000 of the 145 750 000 new shares, thereby increasing its own direct shareholding from 5.98% to 12.84% of the issued share capital. In the opinion of the applicants, the primary, if not the sole, objective of the capital increase was to provide a mechanism whereby Mediobanca could disproportionately increase its influence over Generali to a position in which, together with the Lazard subsidiary Euralux, it could exercise effective control over Generali.

21 According to the applicants, it follows from the documents on the case file that if there had been full and effective disclosure by Mediobanca and Generali, as required by the relevant regulations, the Commission could not have concluded that the composition of the Generali board confirmed that Mediobanca was unable to exercise a decisive influence on any of the organs of Generali, and would also not have failed to refer to the composition of the executive committee. Likewise, in the applicants' view, it is inconceivable that, had there been full and frank disclosure of the content and effect of the agreement, the Commission could have reached the conclusion recorded at point 9 of the decision of 19 December 1991 to the effect that there was no 'company mechanism' guaranteeing the result of propositions concerning the company's bodies.

22 In their observations on the objection of inadmissibility, the applicants dispute in particular the Commission's interpretation suggesting that the 'new fact' on which they relied was the mere publication of the text of the agreement. According to the applicants, the 'new fact' revealed by such publication was that the Commission had been misled in the course of the administrative proceedings as to the true effect of the agreement and in particular as to the actual role and influence of the coordinating committee in Generali's corporate governance. Such a misunderstanding

by the Commission as to the true nature of the applicants' request, they argue, undermines the Commission's arguments on inadmissibility.

23 The applicants also take issue with the Commission's view that the validity of a request for review is subject to the same conditions as those which apply to an application for revision of a judgment of the Court of Justice or the Court of First Instance. Such an analogy is, in the view of the applicants, inappropriate for two reasons. First, since the Commission is an administrative body and not a court, considerations as to the desirability of the finality of judicial proceedings are not directly relevant. Secondly, the competence of the Commission to reopen proceedings which led to an earlier decision on the basis of the discovery by the applicants of a material new fact is widely recognized in other areas of Community law.

24 With regard to the Commission's arguments concerning the applicants' lack of *locus standi*, the latter submit in particular that if they had sought to intervene in the proceedings prior to the adoption of the decision of 19 December 1991, as they undoubtedly would have done had they known then the facts which they subsequently discovered, their *locus standi* could not have been in issue. They point out that their interests are in any event affected even more directly than those of the employees in the undertakings concerned, whose potential interest has been recognized in the interim order of the President of the Court of First Instance in Case T-96/92 R *Comité Central d'Entreprise de la Société Générale des Grandes Sources and Others* v *Commission* [1992] ECR II-2579, at paragraph 31 et seq. At the hearing, the applicants explained that the existence of an agreement between Mediobanca and Lazard prohibiting them from transferring their shares to third parties had been known for a long time and had already been referred to in the minutes of Generali's 1991 annual general meeting. However, the true nature of the agreement had not been revealed to them and that, they claim, was the reason why they did not intervene in the proceedings before the Commission or seek to obtain the text of the decision adopted on 19 December 1991.

25 In conclusion, the applicants contest the Commission's argument that the letter of 31 July 1992 is not amenable to separate judicial review on the ground that it merely confirms the earlier decision of 19 December 1991. They claim in particular

that their request that the case be reopened consisted almost entirely in elaborating those new factors which had come to light since the original decision of 19 December 1991 and that the Commission cannot rely on its failure to consider those new factors as justification for treating the letter of 31 July 1992 as merely confirming the earlier decision.

The Court's appraisal

The legal framework of the proceedings

26 Article 4 of Regulation No 4064/89 provides that concentrations with a Community dimension must be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That notification is suspensive, inasmuch as the concentration cannot, in the absence of express derogation, be put into effect either before its notification or within the first three weeks following its notification. At the same time, Article 10 of the regulation requires the Commission, in order to ensure the effectiveness of the control and the legal certainty of the undertakings involved, to comply with the strict time-limits for initiating proceedings and for adopting the final decision, failure to do which results in the concentration's being deemed compatible with the common market.

27 With particular regard to the examination of the notification and initiation of proceedings, Article 10(1) of Regulation No 4064/89 provides that the Commission must decide, by means of a decision taken within one month, that the concentration does not fall within the scope of the regulation or does not raise serious doubts as to its compatibility with the common market and need not be opposed, or alternatively that it does raise serious doubts and that it is necessary to initiate proceedings.

28 Regulation No 4064/89 nowhere provides expressly for the possibility of requesting the Commission to reopen proceedings. Article 8(5)(a), however, allows the Commission to revoke a decision taken pursuant to Article 8(2) declaring a

concentration compatible with the common market, in particular if such a decision is based on information which is incorrect or was obtained by deceit.

The objection of inadmissibility raised by the Commission

29 The second paragraph of Article 173 of the EEC Treaty provides that any natural or legal person may, under the conditions set out in the first paragraph of that article, institute proceedings 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

30 In deciding whether the present application is admissible, it should first be pointed out that, as the Court of Justice has ruled (order in Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473), the fact that a letter has been sent by a Community institution to a person in response to a prior request by that person is not sufficient for that letter to be regarded as a decision within the meaning of Article 173 of the Treaty, thereby opening the way for an action for annulment. Only measures having binding legal effects of such a nature as to affect the interests of the applicant by having a significant effect on his legal position constitute acts or decisions against which proceedings for annulment may be brought under Article 173 of the EEC Treaty (see the judgment of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

31 Secondly, it follows from the case-law of the Court of Justice that when an act of the Commission amounts to a rejection it must be appraised in the light of the nature of the request to which it constitutes a reply (see, most recently, the judgment of the Court of Justice in Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 22). In particular, the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 173 of the EEC Treaty only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision (with regard to acts in the form of a regulation, see the judgments of the Court of Justice in Case 42/71 *Nordgetreide* v

Commission [1972] ECR 105, paragraph 5, in Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraph 17, and in Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 8; see also point 14 of the opinion of Advocate General Gulmann in *Buckl*, cited above).

32 In the present case, the applicants have requested the Commission to reopen the proceedings in respect of the concentration between Mediobanca and Generali on which the Commission set out its views in the decision of 19 December 1991. The Court notes that the Commission concluded in that decision that the notified operation did not fall within the scope of Regulation No 4064/89 on the ground that Mediobanca would not, following the notified operation, be in a position to exercise, by itself or together with others, a 'decisive influence' on Generali (see paragraph 2 above).

33 The Court takes the view that the applicants were in fact attempting, through their request that the proceedings be reopened, to secure the adoption by the Commission of a decision withdrawing the earlier decision of 19 December 1991, on the ground that the latter decision was based on incorrect information, and the adoption of a new decision in respect of the operation which had been notified to it. The letter of 31 July 1992, which is the subject of the present proceedings, must therefore be interpreted as a refusal by the Commission to decide on such a withdrawal and, consequently, a refusal to re-examine the operation brought to its attention by the notifying parties. It is accepted that the applicants have the status of third parties with regard to the decision first adopted by the Commission on 19 December 1991 and addressed to the undertakings involved in the concentration at issue. In those circumstances, and in accordance with the principle set out above (paragraph 31), the applicants may seek the withdrawal of the original decision of 19 December 1991 only in so far as they are directly and individually concerned by that decision within the meaning of the second paragraph of Article 173 of the EEC Treaty.

34 The Court points out first of all in that regard that the mere fact that a measure may affect the relations between the different shareholders of a company does not of itself mean that any individual shareholder can be regarded as directly and individually concerned by that measure. Only the existence of specific circumstances can enable such a shareholder, claiming that the measure affects his position within

the company, to bring proceedings under Article 173 of the EEC Treaty (see the judgment of the Court of Justice in Joined Cases 10/68 and 18/68 *Società 'Eridania' Zuccherifici Nazionali and Others* v *Commission* [1969] ECR 459).

35 With regard to the question whether such specific circumstances exist in the present case, the Court considers first that the applicants, who rely on their capacity as shareholders of one of the notifying parties, cannot be included among the third parties whose legal or factual position may be affected by that decision. A finding made by the Commission in accordance with Article 6(1)(a) of Regulation No 4064/89 that a concentration notified to it does not fall within the scope of that regulation is not of such a nature as by itself to affect the substance or extent of the rights of shareholders of the notifying parties, either as regards their proprietary rights or the ability to participate in the company management conferred on them by such rights. The applicants, who in this regard merely contend that 'it is self-evident that the acquisition by Mediobanca of such influence will severely diminish the effectiveness of the votes of remaining shareholders, such as the applicants, who are thenceforth in a permanent minority' (point 3.3 of their observations on the objection of inadmissibility), have failed to prove that the decision of 19 December 1991 has affected their legal or factual position.

36 Secondly, the Court notes that that decision finding that the concentration notified does not fall within the scope of Regulation No 4064/89 affects the applicants, in their capacity as Generali shareholders, in the same way as any other of the 140 000 or so shareholders of that company. Even if one were to accept, as the applicants contend and contrary to the findings made in the decision, that Mediobanca had, by itself or together with other companies, acquired control of Generali, such an assumption of control would affect the applicants' interests in the same way as those of the other shareholders. It follows that the Commission decision of 19 December 1991 cannot concern the applicants individually, in particular because their respective shareholdings in the capital of Generali at the material time each represented less than 0.5% of the share capital and because they have failed to prove that by reason of that decision they were placed in a different position to that of any other shareholder. As the Court of Justice has ruled, 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to

them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed' (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95).

37 The Court considers, finally, that the applicants wrongly argued, in support of their contention that they were individually concerned by the decision of 19 December 1991, that their *locus standi* could not be questioned because, if they had sought to intervene in the proceedings which resulted in the adoption of that decision (a course of action which they claim they would have taken had they been aware of the matters subsequently disclosed), they would have had a right of action to protect their legitimate interests, in accordance with settled case-law in the areas of competition, State aid, dumping and subsidies (see the order in Case T-96/92 R *Comité Central d'Entreprise de la Société Générale des Grandes Sources and Others* v *Commission*, cited above, and the judgments of the Court of Justice referred to therein).

38 Even if the Court were to accept that that case-law can be applied to disputes involving concentrations, considerations relating to the legal certainty of traders and the shortness of the time-limits which is a feature of the general system of Regulation No 4064/89 would in any event require that a request for the reopening of proceedings on the ground of the discovery of an allegedly new fact should be submitted within a reasonable period.

39 The Court takes the view in this case that the applicants' informal contact on 6 May 1992 with the Commission's services cannot be regarded as a request for the reopening of the proceedings. Moreover, given that the applicants themselves stated that they had become aware 'at the end of March or beginning of April 1992' of the allegedly new fact, namely the full text of the 1985 Paris agreement, the request for the reopening of the proceedings, submitted to the Commission on 26 June 1992, was made out of time since it was not submitted within a reasonable period. The applicants' argument based on the alleged existence of a new fact must for that reason be rejected.

40 The Court accordingly takes the view that the applicants are not directly and individually concerned by the Commission decision of 19 December 1991 and that the application is for that reason inadmissible, without its being necessary to decide whether reliance on a new fact might in different circumstances have enabled the applicants to circumvent the limitation periods laid down by the Treaty.

Costs

41 Pursuant to Article 87(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. Since the applicants have failed in their submissions, the Commission's claims must be upheld and the applicants ordered jointly and severally to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicants jointly and severally to pay the costs.

Cruz Vilaça Barrington

Biancarelli Briët Kalogeropoulos

Delivered in open court in Luxembourg on 28 October 1993.

H. Jung J. L. Cruz Vilaça

Registrar President