OPINION OF ADVOCATE GENERAL LENZ

delivered on 12 September 1995 *

A — Facts

1. The present case provides the Court of Justice for the first time with an opportunity — in the course of examining an appeal — to comment on questions concerning Council Regulation (EEC) No 4064/89 of 21 September 1989 on the control of concentrations between undertakings [1] (hereinafter 'the Merger Regulation').

2. The facts of the case are as follows. On 27 November 1991 the Commission received a notification under the Merger Regulation which showed that Mediobanca — Banca di Credito Finanziario SpA (hereinafter 'Mediobanca') had increased its shareholding in Assicurazioni Generali SpA (hereinafter 'Generali') from 5.98% to 12.84%. Mediobanca is one of Italy's largest investment banks, while Generali is one of Italy's most important insurance companies. Mediobanca was already the main shareholder in Generali before it acquired the additional shares.

3. On 19 December 1991 the Commission found, in a decision adopted on the basis of Article 6(1)(a) of the Merger Regulation, that the notified operation did not fall within the scope of that regulation. The reason given by the Commission for its decision was that Mediobanca would not be in a position to exercise, by itself or together with others, a 'decisive influence' on Generali. [2] In that context the Commission referred to an agreement which Mediobanca had submitted to it. In the non-confidential version of the decision that agreement is described as a contract between Mediobanca and an undertaking named Euralux, the second largest shareholder in Generali with a shareholding of 4.77%, in which it is agreed that neither Mediobanca nor Euralux may sell their shares to third parties. According to the Commission, that contract contained no arrangements regarding the joint exercise of

* Original language: German.

1 — OJ 1989 L 395, p. 1; corrected version in OJ 1990 L 257, p. 13.

2 — Article 1(1) of the Merger Regulation provides that the regulation is to apply to 'concentrations with a Community dimension'. Article 3(1) of the regulation provides that such a concentration exists if two or more previously independent undertakings merge, or one or more persons already controlling at least one undertaking, or one or more undertakings acquire 'control of the whole or parts of one or more other undertakings'. Article 3(3) provides that 'control' means the possibility of exercising 'decisive influence' on an undertaking.

voting rights and no mechanism intended to ensure the success of proposals regarding the composition of the organs of Generali.

4. On 19 March 1992 an Italian newspaper published the complete text of that previously secret agreement. The agreement, concluded between Mediobanca, Lazard Frères de Paris (the holding company of Euralux) and Generali, was signed on 26 June 1985. According to the findings of the Court of First Instance in its judgment of 28 October 1993, [3] against which the present appeal is directed, that agreement provides *inter alia* for the creation of a steering committee composed of representatives of Generali and its two main shareholders which was intended to discuss questions of general interest concerning Generali and to influence the appointment of certain members of the company's administrative and senior management bodies. [4]

5. Zunis Holding SA, Finan Srl and Massinvest SA (hereinafter 'the appellants'), which all hold shares in Generali, claim that they became aware of that newspaper article at the end of March or the beginning of April 1992. On 6 May 1992 they contacted the Commission on an informal basis. In a letter of 26 June 1992 they formally requested the reopening of the proceedings. They claimed that in its decision of 19 December 1991 the Commission had fundamentally misinterpreted the facts concerning the extent of Mediobanca's ability, by itself or in conjunction with Lazard/Euralux, to control Generali. In the appellants' view such a misapprehension could be attributable only to the fact that the Commission had been incompletely or incorrectly informed regarding the terms of the agreement concluded between Mediobanca, Lazard and Generali and in particular its effects.

6. In a letter of 31 July 1992 the Commission's Director-General for Competition rejected that request. He stated in that letter *inter alia* that the Commission's decision of 19 December 1991 had in no way been based on incorrect information. The Commission had, in fact, been aware of the agreement concluded in 1985 and had taken it into account when making its decision.

7. The appellants then brought an action before the Court of First Instance under Article 173 of the EC Treaty, in which they claimed that the Court should annul the Commission decision which they considered to be contained in the letter of 31 July 1992. The Commission contended that the action was inadmissible and requested the Court of First Instance to decide that question as a preliminary point. The Commission based its objection of inadmissibility on three

3 — Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169.

4 — Case T-83/92 *Zunis Holding and Others* v *Commission*, cited above (footnote 3), paragraph 3.

arguments. [5] First, the letter of 31 July 1992 was not a decision within the meaning of Article 173 of the EC Treaty at all. In it the Commission had, instead, merely informed the recipients of the factual and legal situation. Moreover, it had merely been a first, provisional opinion regarding the request submitted by the undertakings concerned. Secondly, the Commission argued that the letter of 31 July 1992 was not of direct and individual concern to the appellants and they therefore did not have the necessary *locus standi* under the second paragraph of Article 173 of the EC Treaty. [6] Thirdly and finally, the Commission argued in the alternative that the letter of 31 July 1992 could not be challenged by an action under Article 173 because it was at most a decision which merely confirmed the decision adopted on 19 December 1991.

8. In its judgment of 28 October 1993 the Court of First Instance held that the action was inadmissible. The relevant findings are set out in paragraphs 29 to 40 of the judgment.

9. The Court of First Instance stated first that the mere fact that a letter had been sent to a person by a Community institution was not sufficient for that letter to be regarded as a decision within the meaning of Article 173 (paragraph 30). Moreover, an act amounting to a rejection had to be appraised in the light of the request to which it constituted a reply. In particular the refusal by a Community institution to withdraw or amend a particular measure could constitute an act whose legality may be reviewed under Article 173 only if the measure which the Community institution refuses to withdraw or amend could itself have been contested under Article 173 (paragraph 31). In the present case, the appellants had requested the Commission to revoke its decision of 19 December 1991 and to adopt a new decision in the proceedings underlying the former decision. However, as regards *those* proceedings the appellants merely had the status of third parties, when compared with the undertakings directly involved in the operation. They would therefore have been entitled to make a request for the revocation of the decision of 19 December 1991 only if that decision had been of direct and individual concern to them (paragraphs 32 to 34).

According to the Court, the fact that a measure might affect the relations between the shareholders in a company did not of itself mean that any individual shareholder could be directly and individually concerned by that measure (paragraph 34). With regard to the present case, a Commission decision

5 — See paragraphs 14 to 18 of the judgment in the *Zunis* case, cited above (footnote 3).

6 — With the entry into force of the Treaty on European Union on 1 November 1993, the second paragraph of Article 173 of the EEC Treaty became the fourth paragraph of Article 173 of the EC Treaty without the terms of that provision being altered. For the sake of simplicity I will hereafter cite the provision which is now applicable.

holding that a particular operation did not fall within the scope of the Merger Regulation was not by itself of such a nature as to affect the substance or extent of the rights of the shareholders in the undertaking concerned. That applied both as regards their rights as shareholders and their ability to participate in the company management which those rights conferred on them (paragraph 35).

Secondly, it was necessary to have regard to the fact that the Commission's decision of 19 December 1991 affected the appellants in their capacity as shareholders and therefore in the same way as any other of the approximately 140 000 shareholders of that company. In view of the fact that each of the appellants' shareholdings in the capital of the company was less than 0.5% and the appellants had not proved in what respect their situation differed from that of any other shareholder as a result of the Commission's decision, the Court was obliged to find that the decision of 19 December 1991 was not of individual concern to the appellants (paragraph 36).

Finally, the Court found that the appellants had wrongly argued that in accordance with settled case-law in the areas of competition, State aid and dumping they would have had a right of action to protect their legitimate interests, if they had sought to take part in the original proceedings (paragraph 37). Even on the assumption that that case-law could be applied to disputes involving the control of concentrations, requests to reopen proceedings would have to be submitted within a reasonable period (paragraph 38). However, that had not been the case here because the informal contact on 6 May 1992 could not be regarded as a request and the request of 26 June 1992 had to be regarded as out of time, because the appellants, who had become aware of the allegedly new facts by the end of March or the beginning of April, had not submitted that request within a reasonable period (paragraph 39).

10. The appellants have appealed against that judgment. They claim that the Court of Justice should set aside the contested judgment, reject the Commission's objection of inadmissibility, remit the case to the Court of First Instance and order the Commission to pay the costs of the appeal and of the proceedings before the Court of First Instance concerning the objection of inadmissibility. The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

B — Analysis

Preliminary comment

11. Before I discuss the problems to be dealt with in the present case, I consider it advisable first to examine whether the Commission would in any event have been able to grant the appellants' request to reopen the

proceedings and to revoke its decision of 19 December 1991. In order to do so, it is necessary to consider the procedure under the Merger Regulation.

12. If the Commission receives a notification under the Merger Regulation, it may, under Article 6(1) of that regulation, essentially adopt one of three possible decisions. [7] If the Commission concludes that the notified concentration does not fall within the scope of the regulation, it is to record that finding pursuant to Article 6(1)(a) of the regulation. On the other hand, if it finds that the concentration notified falls within the scope of the Merger Regulation, but does not raise serious doubts as to its compatibility with the common market, Article 6(1)(b) of the regulation requires it to decide 'not to oppose it and [to] declare that it is compatible with the common market'. Finally, should the concentration notified raise serious doubts in the abovementioned sense, Article 6(1)(c) of the regulation provides that the Commission is to decide to initiate a proceeding. In those cases Article 8(1) provides that the proceeding shall be closed by means of a decision as provided for under paragraphs 2 to 5 of that article. The Commission can in particular declare the concentration compatible (Article 8(2)) or incompatible (Article 8(3)) with the common market.

13. Article 8(5)(a) provides that the Commission may revoke decisions adopted 'pursuant to paragraph 2' if those decisions are based on 'incorrect information' for which one of the undertakings concerned is responsible or if the decision has been obtained by deceit. [8] Since the decisions provided for in Article 8(2) involve cases falling under Article 6(1)*(c)*, that is to say cases in which the Commission has serious doubts as to the compatibility with the common market of a concentration falling within the scope of the regulation, a literal interpretation of Article 8(5) would exclude the possibility of a revocation, if a decision under Article 6(1)*(b)* or (as in this case) a decision under Article 6(1)*(a)* were involved.

14. However, the Commission has stated that it shares the appellants' view that revocation is possible in such cases. That view is correct. The provision in Article 8(5) of the regulation is not to be regarded as a conclusive rule concerning the possibility of revoking Commission decisions in merger control proceedings. There is no reason why, for example, in the case of deliberate deceit, it should be possible for the Commission to

7 — It is not necessary here to consider the possibility of referral to the competent authorities of a Member State (Article 9 of the regulation) or the consequences which result from the expiry of the periods laid down in the Merger Regulation (Article 10(6) of the regulation).

8 — Such a revocation is also possible if the undertakings concerned commit a breach of an obligation attached to the decision (Article 8(5)(b)). The terms of Article 8(5) therefore cover both cases of revocation and of withdrawal. For the sake of simplicity I will hereafter follow the wording used by the regulation and refer to 'revocation'.

revoke a decision adopted on the basis of Article 8(2), but not one adopted under Article 6(1)(a) or (b). The Commission has, however, correctly emphasized that revocation in the latter cases by analogy with Article 8(5) of the regulation is only permissible under the conditions laid down in that provision and, in each case, it is necessary to have regard to the protection of legitimate expectations.

15. It is self-evident that the Commission may act on its own initiative if it learns of facts which justify revocation of a decision adopted by it under the Merger Regulation. That follows implicitly from Article 8(5) of the regulation itself. However, subject to certain conditions, a right will have to be granted to third parties to request the Commission to reopen a proceeding, if such new facts become apparent, and to seek a review by the Community judicature of a refusal by the Commission to do so. What those conditions are is the subject-matter of the present proceedings.

16. Let me now turn to the objections made by the appellants against the contested judgment. They concern, first, the findings of the Court of First Instance concerning the question of *locus standi* under Article 173 and, secondly, the considerations which led the Court to conclude that the appellants had not submitted their request to the Commission in due time.

Whether the request to reopen the proceedings was submitted out of time

17. As I have already stated, in the contested judgment the Court of First Instance took the view that the appellants' request for the reopening of the proceedings had not been submitted within a reasonable period. It can be assumed from the wording of the relevant passage in the judgment that the Court of First Instance regarded that as a (further) ground for holding the appellants' action to be inadmissible. That is not, however, expressly stated. Nor is it clear why the Court considered that the possible delay in the submission of the request should lead to the inadmissibility of the action. The considerations set out in paragraphs 38 and 39, which are relevant here, are made in the context of the statements made in the previous paragraphs, in which the Court discussed the question whether the appellants had the necessary *locus standi* under the fourth paragraph of Article 173 of the EC Treaty. The next paragraph, paragraph 40, begins with the statement that the Court *accordingly* takes the view that the appellants are not directly and individually concerned by the decision of 19 December 1991. That could indicate that the previous statements in paragraphs 38 and 39 also concerned the question of *locus standi.* Such an interpretation would not however make much sense, because it is not apparent how it could be concluded from any 'delay' in submitting the request

for the reopening of the proceedings that the appellants were not directly and individually concerned by the original decision.

18. I consider that the true meaning of the passage in question is shown by the final part of paragraph 40. Following its finding that the appellants do not have the necessary *locus standi*, the Court states that it is therefore unnecessary to decide whether reliance on a new fact might, in different circumstances, have enabled them to circumvent the limitation periods laid down in the Treaty. The Court therefore seems to assume that the inadmissibility of the action may be the result of the fact that the period of two months laid down in Article 173 could otherwise be circumvented.

19. That consideration — if I have correctly understood it — contains a kernel of truth. If the period for challenging a decision has expired, a party cannot circumvent that bar on bringing proceedings by requesting the Commission to reconsider its decision and then contest the Commission's decision rejecting that request by bringing an action within a period of two months. If such a procedure were permissible, the rule in Article 173 concerning the period for bringing an action would indeed be deprived of any significance. However, such a result can be avoided if the Commission's rejection — assuming that it involves a decision within the meaning of Article 173 at all [9] — is understood as being a measure whose content is limited to confirming the original decision. Such an interpretation is possible and appropriate if the request to reopen the proceedings is not based on new facts which might allow the revocation of the relevant decision. I should point out at this stage that, in my view, a situation of that kind arises in this case, since the appellants have not relied on a *new fact,* as a result of which it might follow that the Commission had proceeded on the basis of false assumptions when adopting its decision of 19 December 1991. Rather, the appellants' basic claim is merely that the Commission misinterpreted the agreement in question made in 1985. [10]

20. However, in its judgment the Court of First Instance did not examine whether the appellants had relied, as against the Commission, on new facts which might possibly have led to the reopening of the procedure. It therefore seems that, regardless of whether or not that requirement was satisfied, the Court considered the action to be inadmissible purely on the basis of the 'delay' referred to. However, such an approach is not correct. It should be evident as a matter of course that in this context it is of no importance whether the request for reopening the proceedings was submitted before the period for contesting the original decision had expired. If, after adopting a decision, a fact is

9 — On that question see point 50 below.

10 — In that regard see point 51 below.

discovered of which the Commission was hitherto unaware and which is of such a nature as to call into question the decision adopted, the time of its discovery cannot be relevant. Whether such a fact becomes known immediately after the adoption of the decision or only months later will often be a matter of chance anyway. If a request to reopen the proceedings is made to the Commission on the basis of that new fact and the Commission rejects it because it does not consider that the circumstances drawn to its attention justify that step, that decision has its own separate subject-matter and may therefore — if the other requirements for bringing an action are satisfied — be contested. It follows from the nature of the matter that there is no reason to fear the circumvention of the periods for bringing an action under Article 173, because the Commission's decision concerns a new fact which could not have been taken into consideration at all when the original decision was adopted and the grounds for challenging that decision can be based only on the contention that the Commission had incorrectly appraised that new fact.

21. Furthermore, the view the Court of First Instance expressed in the passage in question seems to me to involve an error which is probably caused by a confusion of different concepts. The Court of First Instance, it seems, seeks to compare the two-month period laid down by Article 173 with the period of nearly three months which lay between the date when the appellants became aware of the allegedly new fact and the submission to the Commission of the formal request for the reopening of the procedure. In the view of the Court of First Instance, requests for the reopening of proceedings would therefore have to be submitted to the Commission within two months of the discovery of the new fact. That does not seem to me to be correct. As the appellants have correctly stated, the Court is here confusing the periods applicable to the bringing of actions with the question of what are the consequences of a delay in pursuing rights, which is relevant to the question of the protection of legitimate expectations. The period laid down in the fifth paragraph of Article 173 applies to the bringing of *actions*. It is not obvious why *that* period should also be decisive as regards the submission to the Commission of a request for the reopening of proceedings. Applying that time-limit by analogy to the latter case would, at most, be conceivable if there were compelling legal grounds for doing so.

22. I am unable to discern any such grounds. I am not swayed in that connection by the Court's reference to the requirements of legal certainty and to the short time-limits that are a feature of the Merger Regulation, [11] which the Commission also adopted in its observations. As regards the first point, it should be noted that revocation under Article 8(5) of the Merger Regulation is possible if the decision is based on incorrect information for which one of the undertakings is 'responsible' or if that decision has been 'obtained by deceit'. In such cases only those persons affected who are not open to criticism in that respect are worthy of protection. Whether the protection of those persons requires the application of an overall time-limit of two months, calculated from the time of awareness of the new facts, seems

11 — Paragraph 38 of the contested judgment, cited above (footnote 3).

doubtful. Nor am I convinced by the second consideration to which the Court refers. It is true that its particularly strict time-limits are a feature of the Merger Regulation. However, according to the circumstances, they vary between one month and four months. [12] On the other hand, as far as I am aware, the Merger Regulation does not contain a time-limit of two months corresponding to the fifth paragraph of Article 173. However, the most important consideration seems to me to be that Article 8(6) of the regulation provides that the maximum period of four months is not to apply 'in the cases referred to in paragraph 5' — that is to say precisely in cases where a decision is revoked. Admittedly, the provision is directly applicable only where the decision is adopted following a revocation, as a result of which a concentration is declared incompatible with the common market. [13] However, it clearly shows that, in the case of the revocation of a decision, the Commission enjoys greater discretion in terms of time than is normally the case. It is therefore not clear why third parties who become aware of new facts justifying a revocation, and on the basis of which they wish to bring about a reopening of the proceedings, should only be allowed to do so within a strict time-limit of two months.

23. That does not, however, mean that after the discovery of such new facts the persons affected could wait for as long as they wished before approaching the Commission in order to bring about the reopening of the proceedings. I agree with the Court of First Instance that in such a case the matter must be brought before the Commission within a *reasonable period*. If that does not occur, I consider that the Commission can, on that ground alone, simply decline to deal with the request. Any subsequent action against such a decision of the Commission rejecting the request would be unfounded. The basis for that is, however, not a time-limit applied by analogy, but the general legal principle that rights may not be exercised if to do so would constitute an abuse. In my view there is such an abuse if the person who has discovered a relevant new fact fails to act within a reasonable period. The longer the persons affected wait in such a case before approaching the Commission, the more important the requirements of legal certainty become. However, so long as the legislature has not laid down any rules in that area, the question whether the persons affected have acted within a reasonable period will have to be answered not by reference to an *abstract, overall time-limit*, but only by taking into account all the *circumstances of the case itself*.

24. If the matter is looked at from that point of view, the appellants should not be open to criticism in that regard. If they had learned of the allegedly new fact only at the end of March or at the beginning of April 1992, some six weeks at most would have elapsed when they approached the Commission on 6 May 1992. That period of time is in no way

12 — See Article 10(1) and (3) of the regulation. See also the special periods referred to in Article 9.

13 — See Article 8(6) in conjunction with Article 8(3).

unduly long, bearing in mind that the appellants certainly required some time in order to investigate the statements made in the press and to obtain legal advice. I am also unable to share the view of the Court of First Instance that the appellants should have immediately made a formal request for the proceedings to be reopened. It seems, rather, to be entirely sensible first to initiate contact with the Commission on an informal basis in order to give it the possibility, as appropriate, to act on its own account. As the appellants were entitled to assume that the Commission also required some time to examine the facts submitted, it does not appear to me to be in any way unusual or improper that they should have followed up their informal contacts of 6 May 1992 with a formal request for the reopening of the proceedings only on 26 June 1992. However, even if one were to focus, as did the Court, on the period between taking cognizance of the allegedly new fact and the submission of the formal request, it would be difficult to find in view of the considerations just mentioned that the period was unreasonably long.

25. In that context some of the judgments delivered by the Court of First Instance on 29 June 1995 in cases concerning *Solvay* and *ICI* [14] are worthy of note. Those cases concerned *inter alia* the interpretation of Article 48(2) of the Rules of Procedure of the Court of First Instance under which no new plea in law may be introduced in the course of proceedings 'unless it is based on matters of law or of fact which come to light in the course of the procedure'.

In a supplementary application lodged at the Court of First Instance on 10 April 1992 Solvay raised a new plea in law. It was based on a new fact which had come to light on 10 December 1991 in a hearing in another case before the Court of First Instance. That fact concerned the question whether the Commission had duly adopted the decision contested in that case. The Court pointed out that Article 48(2) of the Rules of Procedure lays down 'neither a time-limit nor any particular formality' for the submission of a new plea in law. As Solvay had not been involved in the proceedings in which the hearing of 10 December 1991 had taken place, the Court considered that it could not be assumed that it had become aware of the new fact before reports of it had appeared in the press at the end of February/beginning of March 1992. The period between the appearance of the press articles in question and the lodging of the supplementary application on 10 April 1992 was, in the Court's view, 'reasonable, since it was objectively necessary' for a thorough examination of the issues raised. [15]

Of even greater interest is the judgment in the *ICI* case, in which the same new fact was involved. ICI had raised that fact in a pleading lodged at the Court of First Instance on

14 — Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821, Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825 and Case T-37/91 *Imperial Chemical Industries* v *Commission* [1995] ECR II-1901.

15 — Judgment in Case T-31/91, paragraphs 34 to 35; judgment in Case T-32/91, paragraphs 40 and 41.

2 April 1992. Unlike Solvay, ICI had already taken part in the hearing of 10 December 1991. The Court held that since the case involved a 'highly controversial legal question', ICI had at least been able to await delivery of the judgment in that case on 27 February 1992. The period between the delivery of that judgment and the lodging of the pleading on 2 April 1992 was, in the Court's view, 'reasonable, since it was objectively necessary' for a careful examination of the issues raised. [16]

Although those decisions deal with problems that differ from those in the present case, they do show that when considering the question of whether an act was performed within a reasonable period the circumstances of the individual case are decisive.

26. I am therefore of the opinion that the Court of First Instance was wrong to conclude that the action was inadmissible as a result of the allegedly belated submission to the Commission of the request for the proceedings to be reopened. For that reason it no longer seems to me to be necessary to deal with the appellants' additional complaint that the Court also committed a procedural error in that respect because it did not sufficiently discuss that question with the parties, a question which, moreover, the parties had not even raised. However, as to the merits, that complaint is — in so far as can be gleaned from the information available — likely to be well founded, because it is not apparent from the contested judgment that the parties expressed any opinion on the question whether any such 'delay' could lead to the inadmissibility of the action.

27. However, that error of law can lead to the contested judgment being set aside only if the finding by the Court of First Instance that the action was inadmissible because of the absence of *locus standi* under Article 173 should also prove to be incorrect. As I will now proceed to demonstrate, that is not the case. For that reason I do not need to go into the Commission's claim that the Court's findings concerning the question of the alleged 'delay' were in any event only a supplementary consideration.

Lack of locus standi

28. The appellants make three criticisms of the findings of the Court of First Instance regarding their *locus standi*. First, they claim that the Court misunderstood the case-law concerning the rejection of requests. It wrongly took the view that the present action could be admissible only if the appellants could also have challenged the original decision of 19 December 1991. The correct approach was to ask whether the contested measure — the letter of 31 July 1992 — could have been challenged under Article 173. Secondly, the Court wrongly appraised

16 — Judgment in Case T-37/91, paragraphs 84 and 85.

the question of whether the appellants were directly and individually concerned. The judgment of the Court of Justice in the *Eridania* case [17] was not relevant and had already been superseded. The appellants were directly concerned. As regards the question of individual concern, the Court adopted, without any legal basis, an arbitrary threshold as regards the shareholding which a shareholder bringing an action must possess. Furthermore, the appellants had considerable shareholdings in Generali. Thirdly, the Court wrongly failed to take into account the fact that the appellants would have been entitled to take part in the proceedings after they had been reopened and to bring an action against a decision adopted in those proceedings. In that context, the appellants refer in particular to Article 18(4) of the Merger Regulation under which natural and legal persons 'showing a sufficient interest' are entitled, upon application, to put their views to the Commission. The appellants claim that they satisfy that requirement, because they are significant shareholders in Generali and, furthermore, it was they who brought the relevant new fact to the attention of the Commission.

29. I find those arguments unconvincing. As regards, first, the question whether the Court of First Instance misunderstood the case-law on challenging decisions by which requests are rejected, the appellants are indeed correct in stating that the cases cited by the Court all concerned situations in which the measure whose amendment was sought was a regulation, so that the amending measure could only be adopted as a regulation. [18] Those decisions are therefore not directly relevant to the question to be answered in the present case. However, as the Commission correctly states, the Court's viewpoint is nevertheless apposite. If the measure by which the Commission rejects a request for revocation or amendment of a decision were alone considered relevant, it would be easy to circumvent the requirement of *locus standi* laid down in the fourth paragraph of Article 173. According to the appellants' view, it would, for example, be possible for any person, even one not involved in the events in question, who had read the relevant newspaper article to request the Commission to reopen the proceedings and then to bring an action against the Commission's decision rejecting that request and thereby indirectly to call into question the original decision. That cannot be correct.

30. As the Court of Justice found in its judgment in the *Buckl* case, cited by the Court of First Instance, a Commission decision rejecting a request 'is to be

17 — Judgment in Joined Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459.

18 — See judgment in Case 42/71 *Nordgetreide* v *Commission* [1972] ECR 105, paragraph 5; judgment in Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraph 17, and judgment in Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 8.

appraised in the light of the nature of the request to which it constitutes a reply'. [19] In the passage in Advocate General Gulmann's Opinion in that case, to which the Court of First Instance referred in its judgment, he interpreted the earlier case-law as meaning that in such a case an action can be brought under Article 173 'in so far as the *act which the Council or the Commission refuses to adopt* could have been contested under that provision'. [20] Under that approach, the relevant question in the present case would be whether the appellants would have been in a position to contest the legal measure requested by them — that is to say the revocation of the original decision — but not whether they could have challenged the decision of 19 December 1991. However, only at first sight does that conflict with the view of the Court of First Instance. The Commission has correctly drawn attention to the fact that a person can logically be affected by a legal measure terminating or amending a previous measure only if he has already been affected by the original measure (or if — which is undoubtedly not the case here — the amending measure extends the earlier measure to such an extent that that person is now affected by it). If the appellants were therefore not directly and individually concerned by the decision of 19 December 1991, that also applies to a decision revoking or amending that decision or, as in the present case, refusing to revoke it.

As the Commission has stated, that naturally does not mean that it would have been precluded from granting such a request if it had considered it to be well founded. It means only that in such a case the persons making the request do not have the necessary *locus standi* under Article 173 in order to contest a decision by the Commission rejecting their request.

31. I shall now deal with the question whether the appellants were directly and individually concerned, as required by the fourth paragraph of Article 173. As already mentioned, the Court of First Instance refers in that context to the judgment of the Court of Justice in the *Eridania* case. That case concerned three Commission decisions by which aid was granted to certain sugar factories in Italy. The applicants were competitors of the assisted undertakings from Italy. The Court of Justice held that 'the mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question' cannot suffice 'to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure'. Only 'the existence of specific circumstances' could enable an action to be brought under Article 173 in such cases. [21] Since, in the view of the Court of Justice, the applicants had not succeeded in proving such specific circumstances the action was dismissed as inadmissible. [22]

19 — Judgment in Joined Cases C-15/91 and C-108/91 *Buckl & Söhne and Others* v *Commission* [1992] ECR I-6061, paragraph 22.

20 — Opinion in Joined Cases C-15/91 and C-108/91 *Buckl & Söhne and Others* v *Commission* [1992] ECR I-6074, 6079 (emphasis added).

21 — Joined Cases 10/68 and 18/68 *Eridania* v *Commission*, cited above (footnote 17), paragraphs 7 and 8.

22 — Joined Cases 10/68 and 18/68 *Eridania* v *Commission*, cited above (footnote 17), paragraph 14.

32. That case therefore did not concern the question whether a Commission measure relating to a particular undertaking was of direct and individual concern to its shareholders. On that ground alone it is doubtful how far that judgment can be of relevance to the present case. Whether the decision should also be regarded as having been superseded by the subsequent case-law of the Court of Justice, as the appellants claim, does not, however, need to be answered here. As the Commission correctly claims, the legal proposition expressed by the Court of First Instance in the passage in question is at any rate entirely appropriate. The mere fact that a measure was capable of influencing the relationship between the shareholders in an undertaking (or the relationship between that undertaking and its shareholders) does not by itself mean that any shareholder whatsoever in that undertaking would be directly and individually concerned by that measure. It also makes no difference whether the relevant decision is considered, as it was by the Court of First Instance, to be that of 19 December 1991 or (as the appellants contend) the decision which the Commission would have adopted if the proceedings had been reopened.

33. As regards the question whether the appellants were *directly* concerned, the Court of First Instance stated — as I have already mentioned — that the Commission decision of 19 December 1991 was not of such a nature as by itself to affect the substance or extent of the rights of the shareholders in the undertaking concerned. [23] Now it is certainly correct that the Commission's decision holding that the acquisition of the additional shares in Generali by Mediobanca did not fall within the scope of the Merger Regulation has not as such affected the *nature* of the rights enjoyed by the appellants as a result of their shareholding in Generali. The appellants can, for example, continue to exercise the voting rights associated with the shares and receive dividends due in respect of them. However, if the appellants are correct in claiming that, as a result of the transaction in question, Mediobanca obtained (by itself or with others) control of Generali, the *extent* of those rights would have been considerably affected. As the appellants correctly claim, there is a material difference between the position of a shareholder in an independent undertaking and that of a shareholder in an undertaking controlled by others. Since that is in the nature of things, there is, contrary to the view of the Court of First Instance, no need for the appellants to adduce further evidence in that respect. Whether the appellants' claim is well founded was not discussed by the Court of First Instance and would in any event have been a matter for consideration in the course of its examination of whether the action was well founded. In the context of an examination of the admissibility of the action, which is the subject-matter of these proceedings, I consider that it should be assumed that that claim is correct. The question whether the appellants were *directly* concerned might therefore, in the light of my comments above, indeed have been answered in the affirmative.

34. However, the Court of First Instance has correctly held that the appellants were not *individually* concerned. The Court found that the number of shareholders in Generali amounted to approximately 140 000, none of

23 — Judgment in Case T-83/92, cited above (footnote 3), paragraph 35; see point 9 above.

the appellants holding more than 0.5% of the share capital of Generali. [24] In the present proceedings the parties have given their detailed views concerning the extent of the appellants' actual shareholding in Generali and the relationship between the size of those shareholdings and those of other shareholders. I will not deal with those arguments in any more detail, because they are irrelevant to a decision in the present proceedings. It is established that the appellants were minority shareholders in Generali and therefore basically found themselves in the same position as all other minority shareholders in that company. The appellants have not been able to demonstrate in what respect the Commission's 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'. [25]

35. In that connection the Court of First Instance did not adopt an arbitrary threshold for the shareholding which a shareholder must have if he is to be regarded as individually concerned. It stated, rather, that the appellants had not adduced any factors which allowed the conclusion to be reached that their position was different from that of other minority shareholders. The appellants' claim that they had always shown a special interest in the activity of the managerial organs of Generali is hardly sufficient in that respect. Moreover, the Commission stated — without being contradicted by the appellants on that point — that the minutes of the annual shareholders' meetings of Generali for 1991 and 1992 did not indicate that the appellants' representatives had asked to address the meeting. That fact is certainly not of such a nature as to support the appellants' claim. On the other hand, I do not consider that any significance should be attached to the fact, emphasized by the Commission, that the appellants made no comments during the proceedings which led to the decision of 19 December 1991. The appellants' concerns resulted from the agreement concluded in 1985 between Mediobanca, Lazard and Generali. Since the appellants claim to have become aware of that agreement only in 1992, they had no reason to take part in those proceedings. On the other hand, in that context the appellants are also unable to rely on the fact that it was they who brought the (allegedly) new fact to the attention of the Commission. If that were to be a sufficient ground for a person to be individually concerned, the uninvolved person mentioned earlier who happens to learn of that fact and then informs the Commission, would also have to be regarded as being individually concerned. That cannot be correct.

36. Since, as will be demonstrated below, [26] the appellants are, contrary to their claim, also unable to derive *locus standi* from their position as possible participants in the proceedings, it follows that they were not individually concerned as required by the fourth

24 — Judgment in Case T-83/92, cited above (footnote 3), paragraph 36.

25 — Judgment in Case 25/62 *Plaumann* [1963] ECR 95, 107.

26 — Point 41 et seq.

paragraph of Article 173; their action was thus inadmissible and the contested decision of the Court of First Instance was therefore correct. That accordingly brings to an end discussion of the question of *locus standi*. However, since the present case is the first of its kind, I would like to add some comments of a more fundamental nature. I doubt, in particular, whether shareholders in the undertaking, of which control is (possibly) being acquired, have any right of action at all against decisions made under the Merger Regulation in which the Commission approves a concentration or finds that the regulation is not applicable to that concentration.

37. The Merger Regulation does not lay down any rules for challenging a decision adopted under it. However, the regulation implicitly assumes that all such decisions are subject to review by the Court of Justice. [27] Article 10(5) of the regulation lays down the procedural consequences which follow from that. That provision states: 'Where the Court of Justice gives a judgment which annuls the whole or part of the Commission decision taken under this regulation, the periods laid down in this regulation shall start again from the date of the judgment.'

38. When examining whether there is a right to bring an action under the fourth paragraph of Article 173, however, regard should be had to the objective of the Merger Regulation. According to its recitals, that regulation serves to protect competition and forms part of the 'system ensuring that competition in the internal market is not distorted' which is required by Article 3(g) of the EC Treaty. [28] The appellants' contention that the fact that the Merger Regulation was adopted on the basis of Article 235 shows that it also has other purposes is not convincing. As the Commission's representative correctly stated at the hearing, the Merger Regulation was based on Article 235 only because a new legal instrument was to be created which was, at the same time, intended to be the only instrument applicable to such concentrations. [29] The criteria for appraising concentrations listed in Article 2 of the Merger Regulation also show that its aim is to protect competition.

On the other hand, as the Commission aptly stated, the regulation does not make the

27 — See in particular Article 21(1) of the regulation.

28 — See in particular the first seven recitals in the preamble to the Merger Regulation.

29 — That is confirmed by the seventh and eighth recitals in the preamble to the Merger Regulation.

Commission the guardian of the interests of minority shareholders. It is not apparent how a shareholder in an undertaking involved in merger control proceedings could have an *interest* in a Commission decision under the Merger Regulation *which is relevant to competition*. The present case clearly illustrates that. The appellants' rights, which they consider to have been affected by the operation in question, are their rights as shareholders in Generali. The appellants seem to fear in particular that Mediobanca's acquisition of control, which they presume has taken place, means that their opportunities for influencing the management of Generali have been considerably reduced or wholly excluded. However, the rules governing disputes arising out of distinctions between the rights of shareholders as between themselves and their rights as against the undertaking in which they hold shares is a matter of company law. [30] The Merger Regulation was not created for that purpose. My view therefore tends to be that the shareholders in an undertaking should generally have no *locus standi* to bring actions against Commission decisions in the area of merger control. [31]

39. A comparison with US law seems to me to be useful in that respect. § 4 of the Clayton Act [32] provides that the Federal State Governments and other plaintiffs who have suffered damage 'by reason of anything forbidden in the antitrust laws' can claim payment of a sum three times the amount of the damage. [33] § 16 of the Clayton Act [34] provides that injunctive relief can be claimed if there is a threat of such damage. When so doing, private plaintiffs must in each case demonstrate their *locus standi*. According to the case-law, that requires in particular the plaintiff to have suffered an 'antitrust injury' (or to be threatened by such injury). In its decision in the *Brunswick* case [35] the Supreme Court defined that as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful'. [36] That case concerned an action brought by various bowling centres for damages under § 4 of the Clayton Act as a result of the takeover of certain bowling centres by a competitor. The plaintiffs claimed that, without the takeover, the bowling centres acquired would have gone bankrupt and they would then have been in a position to acquire at least some of the customers of those centres. The Supreme Court found that the plaintiffs' 'damage' was not the kind of damage which the antitrust rules

30 — A conclusion I share with Adrian Brown, *Judicial Review of Commission Decisions under the Merger Regulation: The First Cases* [1994] ECLR 296, 305.

31 — As regards a possible exception in order to preserve procedural rights, see point 47 below.

32 — 15 U. S. C. § 15. The text of the Clayton Act is reproduced in S. Chesterfield Oppenheim, Glen E. Weston, J. Thomas McCarthy, *Federal Antitrust Laws*, 4th edition, St Paul 1981, pp. 1119 ff.

33 — Cf. in that regard and on the following, Barry E. Hawk, *Public and Private Enforcement of Merger Law in the United States*, in: Le contrôle juridictionnel en matière de droit de la concurrence et des concentrations (Actes du séminaire organisé par le Tribunal de première instance des Communautés européennes les 22 et 23 novembre 1993), Luxembourg 1994, pp. 79 ff.

34 — 15 U. S. C. § 26.

35 — *Brunswick Corp.* v *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977).

36 — *Brunswick Corp.* v *Pueblo Bowl-O-Mat, Inc.*, cited above (footnote 35), p. 489. See also *Associated General Contractors of California, Inc.* v *California State Council of Carpenters*, 459 U. S. 519 (1983), in particular p. 540.

were intended to prevent. [37] In its judgment in the *Cargill* case [38] the Supreme Court applied that case-law to actions under § 16 of the Clayton Act. [39]

The American courts have already been required on several occasions to deal with actions by shareholders in an undertaking alleging infringement of the antitrust laws to the detriment of that undertaking. The Circuit Court of Appeals, Third Circuit, had already dismissed such an action in 1910 in the *Loeb* case. [40] That decision was cited with approval by the Supreme Court in its judgment in the *Associated General Contractors* case. [41] In a more recent judgment, an appeal court concluded from this that shareholders of an affected undertaking have no *locus standi*:

'Merely derivative injuries claimed by employees, officers, stockholders, and creditors of an injured company do not constitute "antitrust injury" sufficient to confer antitrust standing.' [42]

40. Under United States law an action based by the appellants on the possible acquisition of control of Generali by Mediobanca would therefore apparently be inadmissible. In the present case, which is to be appraised in the light of rules of Community law, the result should be the same. Shareholders of an undertaking involved in merger control proceedings have no *locus standi* under the fourth paragraph of Article 173 as regards decisions adopted by the Commission under the Merger Regulation. In my view, in such cases the shareholders are not individually concerned. However, in the light of the decision in the *Associated General Contractors* case, it might also be considered that they are not directly concerned because the legal positions they have acquired are merely derivative.

41. Finally, it is necessary to consider the appellants' claim that they have *locus standi* as a result of the fact that, after the reopening of the proceedings which they had sought, they would have been entitled to take part in them. In that respect they rely in particular

37 — *Brunswick Corp.* v *Pueblo Bowl-O-Mat, Inc.*, cited above (footnote 35), pp. 488 f.

38 — *Cargill, Inc.* v *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986).

39 — *Cargill, Inc.* v *Monfort of Colorado, Inc.*, cited above (footnote 38), pp. 109 ff (in particular p. 113).

40 — *Loeb* v *Eastman Kodak Co.*, 183 F 704, 709.

41 — Cited above (footnote 36), p. 533.

42 — Held by the Court of Appeals, Seventh Circuit, *Southwest Suburban Board of Realtors, Inc.* v *Beverly Area Planning Association*, 830 F 2d 1374, p. 1378.

on Article 18(4) of the Merger Regulation, which states as follows:

'In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees shall be entitled, upon application, to be heard.'

42. According to the appellants, by virtue of that provision the Commission would have had to hear them, if it had reopened the proceedings. Their participation in the proceedings would then have given them the right to contest the decision adopted at the end of those proceedings. They claim that they must therefore be regarded as having *locus standi* in the present proceedings as well.

43. That line of argument initially gives the impression that the appellants wished as it were — if I may allow myself to make this comparison — to pull themselves out of the swamp by their own hair, as Baron von Münchhausen claimed to have done. At first sight the Commission's argument that the appellants did not take part in the proceedings leading to the decision of 19 December 1991 and could therefore not bring an action in the present case is attractive. However, as I have already stated, there was no reason for the appellants to take part in those proceedings, because at the material time they were unaware of the new fact at issue in this case. The fact that they did not take part in those proceedings is therefore irrelevant in the present context.

44. It is common ground that the second sentence of Article 18(4) of the Merger Regulation is not a definitive list of those persons which the Commission must hear if they make an application. That is quite clear simply from its wording ('especially'). Nevertheless, on the basis of the view that I have expressed and already explained, [43] I doubt whether a shareholder in an undertaking affected by a concentration has a 'sufficient interest' to be heard by the Commission in the course of merger control proceedings. I tend to agree with the Commission that, at least as regards the present case, the question must be answered in the negative since the appellants had no significant shareholding in Generali. Moreover, even the appellants themselves acknowledge that the Commission is not obliged to hear all those holding shares in such a company, but that it enjoys a discretion in that respect. The Commission is also correct in its view that the fact that the appellants informed it of the allegedly new fact is irrelevant to the examination of the question whether a sufficient interest exists, because any person whatsoever could have

43 — See point 36 et seq. above.

brought that fact to the attention of the Commission. Finally, the Court of First Instance also left that question open and did not — as the appellants claim — implicitly decide it in their favour.

45. However, even on the assumption that the appellants would have had to be heard on the basis of Article 18(4) of the Merger Regulation, it does not follow that they would have to be regarded as having *locus standi* in the present case. The mere fact that a person has been heard in administrative proceedings does not by itself give him a right to contest the decision adopted following those proceedings. It does indeed follow from the consistent case-law of the Court of Justice and the Court of First Instance on competition, dumping, subsidies and State aid that persons to whom a regulation or the EC Treaty itself grants a right to take part in an administrative proceeding have a right to institute proceedings 'in order to protect their legitimate interests'. [44] However, in all those cases the issue involved was — as I have already stated elsewhere — that other undertakings should not receive, create or secure unjustified advantages under the competition rules which result in corresponding disadvantages for the applicant. [45] If in those judgments the Court of Justice and the Court of First Instance referred in particular to the fact that the right to institute proceedings served to protect 'legitimate' interests, it clearly follows that purely external circumstances, in particular participation in the proceedings, are not by themselves sufficient for the applicant to be treated in the same manner as an addressee: the applicant must also fall, as a protected person, within the sphere of application of the relevant competition rule. [46] That requirement has not been fulfilled in the present case. As I have already stated, the purpose of the Merger Regulation is not to protect the interests of shareholders in an undertaking which is a party to a concentration.

46. At the hearing before the Court of Justice the appellants' representatives submitted that the appellants' position could be compared to that of the employees' representatives referred to in Article 18(4) of the regulation. That comment was probably inspired by the two judgments delivered by the Court of First Instance on 27 April 1995 which involved actions brought by such employees' representatives. [47] The actions were dismissed in both cases. However, the Court took the view that the plaintiffs were individually concerned because

44 — Judgment in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13; judgment in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraphs 28 et seq.; judgment in Case 169/84 *Cofaz* [1986] ECR 391, paragraph 23. More recently see the judgment in Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 36, and the judgment in Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-0000, paragraph 26.

45 — See my Opinion in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1148, I-1164 et seq.

46 — Opinion in Case C-313/90 *CIRFS and Others* v *Commission*, cited above (footnote 45), I-1165.

47 — Judgment in Case T-96/92 *Comité Central d'Entreprise de la Société Générale des Grandes Sources and Others* v *Commission* [1995] ECR II-1213 and judgment in Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vittel and Others* v *Commission* [1995] ECR II-1247.

employees' representatives were expressly mentioned in Article 18(4). [48] Whether that view should be adopted does not need to be decided here. In any event Article 18(4) of the regulation does not expressly mention shareholders and no other grounds can be discerned which would enable it to be concluded that the appellants are individually concerned.

47. In both of the abovementioned judgments the Court of First Instance held that the representatives of the employees must, however, at least have a right to ask the Court to review whether the Commission had respected their right to be heard. [49] That is, however, of no relevance to the present case for the simple reason that the Commission noted the appellants' arguments and rejected them by letter of 31 July 1992. In no event, therefore, was there an infringement of the right to be heard.

48. Accordingly, the appellants lacked the necessary *locus standi*. The appeal should therefore be dismissed.

48 — Judgment in Case T-96/92, paragraphs 31 to 32; judgment in Case T-12/93, paragraphs 41 to 42.

49 — Judgment in Case T-96/92, paragraph 46; judgment in Case T-12/93, paragraph 59.

The Commission's other two arguments concerning the inadmissibility of the action

49. Finally, for the sake of completeness, I would like to deal briefly with the other two arguments on which the Commission bases its view that the action is inadmissible. The Commission stated that it continued to rely on those arguments, which had been advanced in the proceedings before the Court of First Instance, in the event of the Court of Justice setting aside the contested judgment of the Court of First Instance.

50. Unlike the Commission, I do not take the view that the letter of 31 July 1992 merely constituted information. Instead, the Commission stated in that letter that it did not intend to grant the appellants' request. In my view, that constitutes a decision within the meaning of the EC Treaty.

51. However, the Commission is correct in pointing out that that decision is not self-contained but merely confirms the decision of 19 December 1991. It is common ground that the Commission was aware of the 1985 agreement when it adopted its decision of 19 December 1991. The appellants' request for the proceedings to be reopened is therefore based not on a fact which is — for the Commission — novel, but on a claim that the Commission misinterpreted that agreement. The letter of 31 July 1992 makes

it clear that the Commission was aware of the agreement in question, had already examined it before adopting the decision of 19 December 1991 and saw no need to change the result of that examination. However, it is settled case-law that 'a measure which merely confirms a previous measure cannot afford those concerned the opportunity of reopening the question of the legality of the measure which is confirmed'. [50] On that ground alone, the appellants' action would therefore have to be treated as inadmissible.

52. The appeal should therefore be dismissed. The decision as to costs follows from Articles 122, 118 and 69 of the Rules of Procedure of the Court of Justice.

C — Conclusions

53. I therefore propose that the appeal be dismissed and the appellants should be ordered to pay the costs of the proceedings.

50 — Judgment in Joined Cases 42/59 and 59/59 *SNUPAT* v *High Authority* [1961] ECR 53, 75; see most recently the judgment of 14 July 1995 in Case T-275/94 *Groupement des Cartes Bancaires 'CB'* v *Commission* [1995] ECR II-2169, paragraph 27.