JUDGMENT OF THE COURT (Fifth Chamber)
11 January 1996 *

In Case C-480/93 P,

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

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

Massinvest SA, a company incorporated under Swiss law, 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 Elvinger, Hoss and Prussen, 15 Côte d'Eich,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 28 October 1993 in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, seeking to have that judgment set aside,

* Language of the case: English.

the other party to the proceedings being:

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet (Rapporteur), J. C. Moitinho de Almeida, C. Gulmann and P. Jann, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 December 1993, Zunis Holding SA, Finan Srl and Massinvest SA ('the appellants') brought an appeal under

Article 49 of the Protocol on the Statute of the Court of Justice of the EEC against the judgment in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169 ('the contested judgment'), in which the Court of First Instance dismissed their application for the annulment of a decision, allegedly contained in a letter of 31 July 1992 sent by the Commission to the appellants, refusing to reopen its investigation in Case IV/M.159 — Mediobanca/Generali (OJ 1991 C 334, p. 23).

2 According to the contested judgment (paragraphs 1 to 6), on 27 November 1991 Mediobanca-Banca di Credito Finanziario SpA ('Mediobanca') notified the Commission 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) of a transaction by which Mediobanca had increased its shareholding in Assicurazioni Generali SpA ('Generali') from 5.98% to 12.84%.

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

4 On 19 March 1992 the Italian daily newspaper *Il Sole 24 Ore* published an article reproducing the full text of a hitherto secret agreement signed in Paris on 26 June 1985 between Generali, Mediobanca, its largest shareholder, and Lazard Frères de Paris ('Lazard'), whose subsidiary Euralux SA was the second largest shareholder in Generali with 4.77% of its share capital. That agreement provided, *inter alia*, for the creation of a steering committee composed of representatives of Generali and

its two main shareholders with a view to examining such problems of Generali as were of common interest to them and influencing the appointment of certain members of the company's administrative and senior management bodies.

5 The appellants, who claim to have become aware of that article 'at the end of March or beginning of April 1992', initiated informal contact with the Commission on 6 May 1992 before submitting, by letter of 26 June 1992, a formal request that the proceedings be reopened. In their request, they claimed essentially that the decision of 19 December 1991 was based on a misinterpretation concerning the influence and control actually exercised by Mediobanca, by itself or in conjunction with Lazard, prior to the increase in its shareholding, which could be attributable only to incomplete or incorrect information given to the Commission regarding the terms of the agreement concluded between Mediobanca, Lazard and Generali.

6 In a letter of 31 July 1992, signed by the Commission's Director-General for Competition, the Commission rejected that request on the ground, *inter alia*, that the decision of 19 December 1991 had not been based on incorrect information, as had been alleged, since 'the Commission knew of the 1985 Paris Agreement and took it into account when making its decision'.

7 On 30 September 1992 the appellants brought an action before the Court of First Instance seeking the annulment of the decision allegedly contained in the letter of 31 July 1992. The pleas in law on which the application was based are summarized in paragraphs 19 to 21 of the contested judgment.

8 The Commission raised an objection of inadmissibility against the action and claimed, *inter alia* (see paragraphs 14 to 18 of the contested judgment), that the

letter of 31 July 1992 did not constitute a decision directly and individually concerning the appellants, since they did not have *locus standi* either to challenge the initial decision of 19 December 1991 or to request the reopening of the investigation which had led to that decision.

9 In the contested judgment, the Court of First Instance upheld the objection raised by the Commission and dismissed the application as inadmissible.

10 The appellants claim that the Court of Justice should set aside the contested judgment, reject the Commission's objection of inadmissibility and remit the case to the Court of First Instance for a decision on its merits.

11 It is necessary, at the outset, to consider whether the letter of 31 July 1992 constitutes a measure against which an action may be brought. That question has been raised by the Commission before both the Court of First Instance and the Court of Justice.

12 Publication of the article in the daily newspaper *Il Sole 24 Ore*, which resulted in the appellants' representations to the Commission, was not, in the circumstances of the present case, a new fact. It follows from the very wording of the decision of 19 December 1991, as published, and *a fortiori* from the confidential version of that decision which was brought to the notice of the appellants during the proceedings before the Court of First Instance, that the Commission was aware of the agreement in question when it adopted the decision of 19 December 1991. Moreover, in their appeal the appellants no longer really dispute that the Commission was aware of that agreement when it adopted its decision; what they contest is the Commission's appraisal of the agreement.

13 In these circumstances, the Commission's reply of 31 July 1992 was, as the Commission contends, a decision which simply confirmed its decision of 19 December 1991. It did no more than inform the appellants that the Commission had been aware of the agreement and, consequently, did not consider that there was any need to alter that decision.

14 It is settled case-law of the Court of Justice that a decision which merely confirms a previous decision is not an actionable measure (see, *inter alia*, the judgments in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 4, and in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16).

15 That being so, the action brought by the appellants before the Court of First Instance was inadmissible and could not but be dismissed. It follows that the operative part of the contested judgment is well founded, albeit on a legal ground other than that adopted by the Court of First Instance (see the order in Case C-32/92 P *Moat* v *Commission* [1992] ECR I-6379, paragraph 11).

16 Consequently, the appeal must be dismissed without there being any need to consider the pleas in law relied upon by the appellants.

Costs

17 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the appellants have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellants to pay the costs.

Edward Puissochet Moitinho de Almeida

Gulmann Jann

Delivered in open court in Luxembourg on 11 January 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber