OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 23 October 1997 *

I — Introduction

1. In this reference for a preliminary ruling the Raad van State (Council of State), Belgium, is asking the Court to define the scope of one of its earlier judgments [1] in which it interpreted Directives 71/304/EEC [2] and 71/305/EEC, [3] adjudging that holding companies may be registered on lists of approved undertakings for the purposes of participation in tendering procedures, where such companies are able to establish that they actually have available to them the resources necessary for carrying out the works. The point at issue in the present case is whether or not Member States are under an obligation to take account of the dominant position of a holding company vis-à-vis the companies within the group.

II — Facts of the case

2. The circumstances which gave rise to the preliminary question before the Court today are the same as those in Case C-389/92 on which the Court ruled in the abovementioned judgment of 14 April 1994 and whose operative part forms the subject-matter of this request for interpretation.

3. In that case, to which I refer for a fuller account of the factual and legal elements of the present case, the Court held that 'Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts are to be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an application for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works. It is for the national court to assess whether such proof has been produced in the main proceedings'.

* Original language: Italian.

1 — Judgment of 14 April 1994 in Case C-389/92 *Ballast Nedam Groep v Belgian State* [1994] ECR I-1289.

2 — Council Directive of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches (OJ, English Special Edition 1971 (II), p. 678).

3 — Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

4. The national court is now querying, also in the light of the Opinion delivered by Advocate General Gulmann in the abovementioned case, [4] the precise meaning of the term 'permit' used in the operative part of the abovementioned judgment and whether that expression confers on the Member States a discretionary power in relation to the grant of registration.

In order to resolve the dispute before it, the Raad van State, Belgium, submitted the following questions to the Court for a preliminary ruling:

'Should the word "permit" in the phrase "permit ... account to be taken ..." appearing in the operative part of the judgment given on 14 April 1994 in Case C-389/92 be understood as meaning "require"?

If the word "permit" in the abovementioned phrase is not to be understood as being equivalent to the word "require", does that mean that the Member State in question enjoys a discretionary power in the matter, even where the condition laid down by the Court is satisfied?

In which cases and on what grounds is it then appropriate to take account of the companies belonging to a dominant legal person of a group?'

III — Analysis of the dispute

5. The question before the Court must be answered by placing the term at issue 'permit' in the context of the abovementioned judgment. It is evident that the Court used that expression, having in mind the spirit of Directives 71/304 and 71/305 by which the Community sought to liberalize the sector of public works contracts and to enable European undertakings to participate in tender procedures in the Member States, thus removing the obstacles which were impeding the achievement of an open market for the provision of services in question. [5] The Court was in fact seeking to secure for the undertakings of the other Member States the possibility of participating on an equal footing with the undertakings of the Member State in question in the tender procedures governed by Directive 71/305.

In that connection it is obvious that for a Member State to be able to exercise a discretionary power in regard to the registration in question, which may constitute a condition

4 — Opinion of 24 February 1994 in *Ballast Nedam Groep* v *Belgian State* [1994] ECR I-1289, at p. 1291.

5 — Cf. 7th and 9th recitals in the preamble to Directive 71/305.

of participation in contract-awarding procedures, would be to negate the substance of the rule contained in Article 28(4) of Directive 71/305, according to which: 'for the registration of contractors of other Member States in such a list, no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Articles 23 to 26.'

6. It should also be pointed out that in the previous judgment the Court used the expression 'permit' which is precisely the expression used by the national court in the preliminary question which it submitted in that case. Accordingly, that expression must be construed in the light of the judgment at issue and may be understood by a consideration of the condition laid down by the Court which in that connection requires that 'the legal person in question establishes that it actually has available the resources of those companies [the companies in the group] which are necessary for carrying out the works.'

7. Consequently, it follows from the foregoing that the Member State enjoys no discretionary power with regard to the decision on registration of holding companies, once the conditions laid down by the Court are satisfied. It is however for the Member State to verify that those conditions are in fact fulfilled by the holding company. It is also in my view for the Member State to define for that purpose appropriate criteria enabling detailed rules to be laid down under which a group of companies may be regarded as providing the guarantees necessary in order to ensure observance of the undertakings entered into on any award of a public works contract.

8. I do not wish to hide the fact that it would doubtless be desirable in this matter if the Community legislature were to intervene in order to harmonize and coordinate the various provisions of company law governing the liability of the group and, individually, of the companies forming part of the group, in regard to undertakings made by the dominant company of the group on the award of the contract to it. In fact, sensitive problems arise from the assimilation of a group taken in the aggregate to a sole undertaking. Those are questions of wider scope which, as I have already said, ought to be reflected on more widely when the applicable rules are drawn up. Advocate General Gulmann, in his Opinion [6] in Case C-389/92, made reference to it and specifically alerted the Court that a general and abstract reply could not be given and that from his point of view it was preferable to focus on resolving the specific problem before the Court.

9. Problems such as those which arise in situations of a conflict of interest between the dominant company of a group and participating companies or those relating to the inappropriate formulation of the object clause of companies which are in fact to carry out the works in respect of which a contract has been awarded could in fact cause serious harm to the awarding body if

6 — Opinion cited above at footnote 4.

they are not discovered and resolved in time. It is also appropriate to bear in mind the fact that decisions of national courts in regard to conflicts of interests within a group or concerning the nullity of a decision on the ground that it is contrary to the objects clause, generally arise out of situations in which the creditor of a participating company or of a minority company seeks to rely on the defects in the contested transaction in order to prevent certain of the assets of the participating company from being placed beyond his reach and added to the assets of the holding company or, again, in order to seek a declaration of the dominant company's liability in regard to the assets. National courts have sought to resolve these problems by finding solutions, depending on the circumstances, which, even if they may certainly be capable of improvements, to a large extent enable the twofold necessity to be confronted, namely of ensuring the proper and correct conduct of commercial transactions and transparency in relations between creditors, shareholders and companies. [7]

10. In the case before the Court, on the other hand, the situation is in essence reversed: the creditor in question is the awarding body and its contractual partner is the holding company which performs the contract through the intermediary of companies within its group. The relations existing between the holding company and the companies in the group may be of the most varied nature as regards the extent of participation and even the nature of the legal relationships which bind them together. The influence of national company law may, moreover, play a decisive role as far as the image and structure of the group are concerned. In that situation, the awarding entity could actually be penalized by the fact that it would not be able validly and effectively in such cases to require the holding company and, more importantly, the various companies within the group to honour the undertakings made by the holding company when the contract was awarded. [8] In other words, the requisite conditions must be met in order that the companies within the group are in fact subject to the obligation to perform provided for, which must take the form of a legally binding obligation. [9] It goes without saying that the context in which this problem arises is rendered considerably more complicated when one reflects on the consequences stemming from the fact that, even within a group, the company laws of different Member States are applicable at the same time, which means that recourse must inevitably be had to the rules of private international law, which are often unable to permit the person interpreting them to find his way through the intricacies with which he is faced and above all to ensure full equivalence

7 — See in this connection for a comparative approach, amongst others, Wooldridge, F., 'Aspects of the regulation of groups of companies in European laws', in *European Company Laws — A Comparative Approach*, Aldershot, 1991, p. 103; Cerrai, A., Mazzoni, A., 'La tutela del socio e delle minoranze', in *Il diritto delle società per azioni: problemi, esperienze, progetti*, Milan 1993, p. 339; Hopt, K. J.: 'Groups of companies, Legal elements and policy decisions in regulating groups of companies', loc. cit. p. 715; Grierson, C. K., 'Shareholders liability, Consolidation and Pooling', in *Current Issues in Cross-Border Insolvency and Reorganizations*, London 1994, p. 205.

8 — The situation which presents itself is in fact analogous in certain respects to that of the undertaking which subcontracts a part of a contract to third parties. In that connection Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305 (OJ 1989 L 210, p. 1), inserted into the latter directive Article 20, although it is not applicable *ratione temporis* to the present case. That new provision provides that 'in the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties. This indication shall be without prejudice to the question of the principal contractor's responsibility.'

9 — See in that connection the observations formulated by G. Rossi in connection with the judgment of 14 April 1994 in *Giurisprudenza Italiana*, part 1, section 1, column 545, 1995.

as between the rules of States having different traditions and conceptions of the law. [10]

11. The principle of law laid down by the Court in the abovementioned judgment consequently requires the Member States not only to observe the principle of non-discrimination which is manifested in the present case by the prohibition on exercising a discretionary power when the registration in question is granted, but also to show particular diligence in laying down and applying objective and transparent rules such as to ensure, within the context of the rules applicable in the Member State in question, actual observance of the conditions enunciated by the Court, namely that the company in question actually has available to it the means which are necessary for carrying out the contracts. If such proof was not provided, competition would in fact be distorted because one would be allowing groups of companies without the proper means, from both the legal and technical and economic point of view, to participate on an equal footing in the award procedure, alongside candidates which for their part fully satisfy those criteria.

IV — Conclusion

12. In the light of the foregoing I propose that the reply to be given to the question raised by the Raad van State, Belgium should be as follows:

The word 'permit' appearing in the operative part of the judgment given on 14 April 1994 in Case C-389/92 should be understood as meaning 'require'.

10 — The need for a group of companies participating in an award procedure to have a specific legal form is acknowledged by Article 21 of Directive 71/305 which provides: 'tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however the group selected may be required to do so when it has been awarded the contract.' Of course, in the case of a holding company, this rule may give rise to different interpretations, depending on whether the group as a whole is deemed to constitute a single entity in which case Article 21 does not apply or whether the rule in question is applied to the tender submitted by the holding company, when the companies within the group may be required to have a specific legal form.

However, it is for the national authorities to ensure compliance with the condition to which that obligation is subject and, in particular, to ensure that the means necessary for carrying out the contract are fully available on the basis of non-discriminatory criteria such as to effectively safeguard also the rights and legitimate expectations of the awarding bodies.