# JUDGMENT OF THE COURT (Third Chamber)
18 December 1997 *

In Case C-5/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Raad van State, Belgium, for a preliminary ruling in the proceedings pending before that court between

**Ballast Nedam Groep NV**

and

**Belgian State**

on the interpretation of the judgment of the Court of 14 April 1994 in Case C-389/92 *Ballast Nedam Groep* [1994] ECR I-1289,

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, acting for the President of the Chamber, J.-P. Puissochet (Rapporteur) and L. Sevón, Judges,

Advocate General: A. La Pergola,
Registrar: R. Grass,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Ballast Nedam Groep NV, the applicant in the main proceedings, by Marc Senelle, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, General Adviser at the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the Commission of the European Communities, by Hendrik van Leer, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

## Judgment

1 By judgment of 18 December 1996, received at the Court on 13 January 1997, the Raad van State (Council of State), Belgium, referred to the Court under Article 177 of the EC Treaty a question concerning the interpretation of the judgment given by the Court in Case C-389/92 *Ballast Nedam Group* v *Belgian State* [1994] ECR I-1289 (hereinafter '*BNG I*').

2 The question has been raised in proceedings between Ballast Nedam Groep, a company incorporated under Netherlands law (hereinafter 'BNG'), and the Belgian State concerning non-renewal of the registration of that undertaking. Those proceedings have already given rise to the submission of a preliminary question on

the interpretation of 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 (OJ, English Special Edition 1971 (II), p. 678) and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

3 The question submitted by the Raad van State in its first reference for a preliminary ruling was as follows:

'Do 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, in particular Articles 1, 6, 21, 23 and 26, permit, in the event of the Belgian rules on the registration of contractors being applied to the dominant legal person within a "group" governed by Netherlands law, in connection with the assessment of the criteria relating *inter alia* to technical competence which a contractor must satisfy, account to be taken only of that dominant legal person as a legal entity and not of the "companies within the group" each of which, having its own legal personality, belongs to that "group"?'

4 In its judgment in *BNG I*, the Court replied to that question that Directives 71/304 and 71/305 had to be interpreted as permitting, 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 was being examined, account to be taken of companies belonging to that group, provided that the legal person in question established that it actually had available the resources of those companies which were necessary for carrying out the works. It was for the national court to assess whether such proof had been produced in the main proceedings.

5 Since the parties to the proceedings cannot agree on the meaning of that ruling, the Raad van State has decided to refer to the Court a further question for a preliminary ruling, worded as follows:

'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?'

6 By this question the national court is asking in effect whether it follows from the judgment in *BNG I* that Directives 71/304 and 71/305 are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where that person is established as having actual power of disposition over the resources of the companies belonging to the group necessary for performing works contracts, to take account of those companies.

7 BNG and the Commission consider that that question calls for an affirmative reply. In their view, where proof is produced that the dominant legal person of a group has actual power of disposition over the resources of the companies belonging to that group, the competent authority must necessarily take account of those companies.

8 For its part, the Belgian Government contends, with reference to the judgment of the Court in Joined Cases 27/86, 28/86 and 29/86 *CEI and Others* [1987] ECR 3347, that the Member States enjoy a margin of discretion in assessing the classification criteria to be satisfied by a contractor upon examination of an application for registration lodged by a dominant legal person of a group, even if the condition laid down by the Court is satisfied.

9 The reference to that case is not relevant. Whilst, as the Court pointed out at paragraph 22 of the judgment in *CEI and Others*, the criteria for classification in the various official lists of recognized contractors provided for in Article 28 of Directive 71/305 are not harmonized, that is not true of some of the qualitative selection criteria laid down in Articles 23 to 28, in particular references attesting to contractors' financial and economic standing and their technical knowledge and ability provided for in Articles 25 and 26. It is clear from the judgment in *BNG I* that the condition laid down by the Court therein specifically relates to references for demonstrating the technical, financial and economic standing of a company seeking registration on an official list of approved contractors.

10 In that judgment, the Court stated first that a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures (paragraph 15).

11 It went on to state that it is for the contract-awarding authorities, as Article 20 of Directive 71/305 specifies, to check the suitability of contractors in accordance with the criteria referred to in Articles 25 to 28 of that directive (paragraph 16).

12 Finally, the Court explained that when a company produces references relating to its subsidiaries in order to prove its economic and financial standing and technical knowledge, it must establish that, whatever the nature of its legal link with those

subsidiaries, it actually has available to it the resources of the latter which are necessary for carrying out the contracts. It is for the national court to assess, in the light of the factual and legal circumstances before it, whether such proof has been produced in the main proceedings (paragraph 17).

13 It follows from all the foregoing considerations that a holding company which does not itself carry out works may not be precluded from participating in procedures for the award of public works contracts, and, therefore, from registration on an official list of approved contractors if it shows that it actually has available to it the resources of its subsidiaries necessary to carry out the contracts, unless the references of those subsidiaries do not themselves satisfy the qualitative selection criteria mentioned in Articles 23 to 28 of Directive 71/305.

14 The reply to the question submitted must therefore be that Directives 71/304 and 71/305 are to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in Articles 23 to 28 of Directive 71/305.

## Costs

15 The costs incurred by the Belgian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Raad van State, Belgium, by judgment of 18 December 1996, hereby rules:

**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 the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take account of the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in Articles 23 to 28 of Directive 71/305.**

Moitinho de Almeida Puissochet Sevón

Delivered in open court in Luxembourg on 18 December 1997.

R. Grass J. C. Moitinho de Almeida

Registrar For the President of the Third Chamber